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Supreme Court, U.S.
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No. ________

In the

Supreme Court of the United States

October Term, 1999

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

Alfred Smallwood, *et al.*

Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. May a plaintiff trigger the strict scrutiny of *Shaw* in a mixed motive case simply by showing that the challenged district is somewhat irregular in shape and the State considered race, along with a number of other factors, in designing it?

2. May a plaintiff trigger the strict scrutiny of *Shaw* simply by showing that the challenged district was intentionally created as a majority-minority district?

3. Does a final judgment from a court of competent jurisdiction, which finds a State's congressional redistricting plan does not violate the constitutional rights of plaintiffs and authorizes the State to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by those plaintiff's privies?

4. Should a court enjoin an election after a State's election machinery is in full progress and require the State to enact a new redistricting plan based on an outdated census that will be superseded by the imminent 2000 Federal Census?

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LIST OF PARTIES

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official capacity as Secretary of the State of North Carolina, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER, and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, are appellants in this case and were defendants below;

ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH, and GEORGE SIMKINS, are intervenor-appellants in this case and were intervenor-defendants below;

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R.O. EVERETT, J.H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, LOIS WEAVER, and JOEL K. BOURNE are appellees in this case and were plaintiffs below.

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JURISDICTIONAL STATEMENT

Governor James B. Hunt, Jr., and the other state defendants below appeal from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, dated March 7, 2000, which held that District 12 in the State's 1997 Congressional Plan is an unconstitutional gerrymander and enjoined the State from conducting any elections under that plan.

OPINIONS BELOW

The March 7, 2000, majority opinion of the district court and the concurring and dissenting opinion of the Honorable Lacy Thornburg, District Court Judge sitting by designation as Circuit Judge, which has not yet been reported, appear in the Appendix at 1a and 37a, respectively.[1]

JURISDICTION

The district court's judgment was entered on March 8, 2000. App. 71a. On March 10, 2000, appellants filed notice of appeal to this Court. App. 69a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment. App. 73a.

STATEMENT OF THE CASE

A. LEGAL PROCEEDINGS

This case and *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"), are intertwined. On June 13, 1996, this Court in *Shaw* declared District 12 in North Carolina's 1992 congressional redistricting plan an unconstitutional racial gerrymander, but declined to consider a challenge to District 1 because no plaintiff had standing to challenge it. Following remand, the *Shaw* plaintiffs amended their complaint and added as plaintiffs persons residing in District 1.[2] The same day, Mr. Cromartie, *et al.*, filed this separate action, represented by the same attorney who represented them in *Shaw*. All proceedings in this action were stayed pending completion of the *Shaw* litigation. In the meantime, the *Shaw* district court allowed the 1992 plan to be used for the 1996 election, but enjoined any further use of that plan and directed the General Assembly to submit a new plan for the district court's approval.

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[1] Reference to the Appendix of this Jurisdictional Statement hereafter will appear as "App. ___a".

On March 31, 1997, the General Assembly enacted a new congressional districting plan, 1997 N.C. Sess. Laws, ch. 11 ("1997 Plan"), App. 75a, and submitted the plan to the *Shaw* district court for approval. In the remedial proceedings, Cromartie, Muse, and the other *Shaw* co-plaintiffs were given an opportunity to litigate any constitutional challenges. The district court directed them to advise the court "whether they intend[ed] to claim that the [new] plan should not be approved by the court because it does not cure the constitutional defects in the former plan." *Shaw, et al. v. Hunt, et al.*, CA No. 92-202-CIV-5-BR, Order (E.D.N.C. June 9, 1997). They did not avail themselves of that opportunity. Instead, they contended that the 1997 Plan was unconstitutional but nevertheless requested the court to "not approve or otherwise rule on the validity" of the new plan, and to "dismiss this action without

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[2] These new plaintiffs were Martin Cromartie, Thomas Chandler Muse and Glennes Dodge Weeks. App. 283a.

prejudice to the right of any person having standing to maintain a separate action attacking [its] constitutionality." App. 308a. The state defendants actively opposed plaintiffs' effort to reserve their challenges to the 1997 Plan for a new lawsuit. The district court in *Shaw* rejected plainitffs' invitation to avoid ruling on the merits of District 12. Instead, it ordered the 1997 Plan "APPROVED as having adequately remedied the specific constitutional violation respecting former congressional District 12." App. 312a. No appeal was filed from that order or the identically worded judgment filed three days later on September 15, 1997.

On October 17, 1997, the stay order in this case was dissolved by the district court, and on that same date plaintiffs filed an amended complaint claiming that Districts 1 and 12 in the 1997 Plan, just approved by the district court in *Shaw*, were unconstitutional. After the State's 1998 election process had begun, plaintiffs in January and February moved for a preliminary injunction and for summary judgment.

The district court, with Circuit Judge Sam J. Ervin, III, dissenting, granted summary judgment to plaintiffs, declared District 12 unconstitutional and permanently enjoined the State from conducting any primary or general election under the 1997 Plan. This Court noted probable jurisdiction and reversed the district court's summary judgment. *Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545 (1999) ("*Cromartie I*").[3]

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[3] As a consequence of the failure to stay the district court's summary judgment order, the General Assembly was required to enact an interim congressional districting plan for the 1998 election. 1998 N.C. Sess. Laws, ch. 2 ("1998 Plan"). Thereafter, the 1998 congressional districting elections were held under the 1998 Plan pursuant to a truncated (cont'd . . .)

Following this Court's reversal of the 1998 summary judgment order, the district court established a schedule for discovery to be conducted prior to October 2, 1999, and for trial to be held the week of November 1, 1999. After the untimely death of Circuit Judge Sam J. Ervin, III, United States District Court Judge Lacy H. Thornburg was assigned to the three-judge panel, sitting by designation as Circuit Judge. Trial was held from November 29 through December 1, 1999. Waiting over three months to issue its opinion after expediting trial, the district court filed essentially a carbon copy of its previous summary judgment opinion, with minimal cosmetic changes. It ruled unanimously that District 1 was constitutionally drawn, but a majority ruled that District 12 was an unconstitutional racial gerrymander. The opinion enjoined defendants from using District 12 in future elections. Judge Thornburg wrote a concurring and dissenting opinion in which he agreed that District 1 was constitutional, although he disagreed with the majority's conclusion that District 1 was subject to strict scrutiny. He dissented as to District 12, concluding plaintiffs had completely failed to meet their burden of showing race predominated in drawing the district.

B. THE 1997 CONGRESSIONAL REDISTRICTING PROCESS

The 1997 Plan was enacted by the General Assembly on March 31, 1997. It is a bipartisan plan, the product of a General Assembly divided between a majority Democratic Senate and a majority Republican House. When the

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schedule, with primary elections in September and no second or runoff primaries. The 1998 Plan ceased to be effective once this Court reversed the district court's summary judgment invalidating the 1997 Plan.

redistricting process began, many did not believe that the politically divided legislature could successfully negotiate a plan and prevent redistricting from falling to the federal court by default. Nowhere in its opinion does the district court acknowledge this critical political reality. However, through the leadership efforts of Senator Roy Cooper, Chairman of the Senate Redistricting Committee, and Representative Edwin McMahan, Chairman of the House Redistricting Committee, a new plan was developed that cured the constitutional defects in the prior plan and garnered the support of a majority of the members of the Senate and a majority of the members of the House.[4] From the beginning, Cooper and McMahan recognized that the only path by which a compromise could be reached was to craft a plan which, while curing the constitutional defects, also preserved the existing six-six partisan balance between Democrats and Republicans in the State's congressional delegation. Because party registration is not a reliable predictor of voting behavior, the committees used voting results from a series of elections to craft Democratic and Republican districts.[5] App. 82a, 92a, 94a, 99a-100a, 138a, 145a, 150a-151a.

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[4] Although there was bipartisan support for the plan, twelve of seventeen African-American members of the House voted against the plan because they believed it did not adequately take into account the interests of the State's African-American citizens. App. 140a, 152a-153a.

[5] The redistricting computer included voting data at the precinct level for three state races: the 1988 Court of Appeals election, the 1988 Lieutenant Governor election, and the 1990 United States Senate election. In addition, more recent election results were also available to the committee chairman through other sources. App. 83a-84a, 100a-102a, 138a-139a.

Acutely conscious of their responsibilities under *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), the General Assembly's first goal in enacting the 1997 Plan was to cure the defects in the 1992 plan by assuring that race did not predominate over traditional race-neutral redistricting criteria in the drawing of districts. Toward this end, the new plan was designed to: (1) avoid dividing precincts; (2) avoid dividing counties, except as needed to maintain partisan balance; (3) eliminate "cross-overs," "double cross-overs," long narrow corridors and other artificial means of maintaining contiguity; and (4) group together citizens with similar needs and interests. App. 82a-83a, 91a, 95a-96a, 102a-103a, 112a, 138a.

The 1997 Plan creates six Democratic districts and six Republican districts, preserving the partisan cores of their 1992 predecessors, yet their lines are significantly different. The most dramatic changes are in District 12, which contains less than 70% of its original population and only 41.6% of its original geographic area. App. 103a-14a, 122a. The 1997 Plan respects the traditional race-neutral redistricting criteria identified by the legislature: District 12 divides only one precinct, for partisan reasons; it includes parts of only six counties; its appearance is greatly improved by being shorter, wider and no longer held together by reliance on artificial devices like cross-overs and point contiguity. It comprises a district joining together citizens with similar needs and interests in the urban and industrialized areas along the interstate highways that connect Charlotte and the Piedmont Urban Triad,[6] areas in which the bulk of the State's recent population growth has occurred. App. 84a, 139a. Moreover, because District 12 is built around major transportation corridors, it functions effectively for representatives and for constituents.[7] District 12 is not a majority-minority district by any measure;[8] it is, however, a Democratic district by every measure.[9]

Although the House and Senate initially differed on the question of extending District 12 either to Winston-Salem (Senate) or to High Point and Greensboro (House), ultimately it was decided to include all three parts of the Triad. This decision to include all of the Triad cities was purely partisan.[10]

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[6] The Triad is composed of the cities of Winston-Salem in Forsyth County, and Greensboro and High Point in Guilford County.

[7] District 12's "focus upon major transportation corridors" makes its travel time compactness substantively better than that of many districts that technically score higher under mathematical measures of compactness. *See* Def. Ex. 421. District 12 is similar in concept to Georgia's three-judge court remedial District 11, which connects parts of 13 different counties, splitting six of them. Because the district is built around the "connecting cable" of Interstate 85, and has a distinctive "urban/suburban flavor," its residents have "a palpable community of interests." *Johnson v. Miller*, 922 F. Supp. 1556, 1564, *aff'd Abrams v. Johnson*, 521 U.S. 74 (1997).

[8] Only 46.6% of its total population, 43.36% of its voting age population, and 45.6% of its registered voter population is African-American. App. 77a-79a.

[9] Seventy-five percent of the district's registered voters are Democrats, and at least 62% of them voted for Democratic candidates in the 1988 Court of Appeals election, the 1988 Lieutenant Governor's election and the 1990 United States Senate election. App. 80a.

[10] The extrinsic evidence in the record established that the initial Senate plan, Cooper 2.0, extended to Winston-Salem in Forsyth (cont'd . . .)

District 1 is another of the six Democratic districts established by the 1997 Plan and is a bare majority-minority district by one measure: 50.27% of its total population is African-American.[11] District 1 respects traditional race-neutral redistricting criteria: it divides no precincts; divides only 10 counties; it is compact; and artificial devices such as cross-overs and point contiguity were eliminated. Irregularities in the district lines are the result of incumbency protection and other political concerns. App. 109a-111a, 114-115a, 143a. It comprises a district with a community of voters defined by shared interests other than race[12] joining together citizens with

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County and High Point in Guilford County, but did not extend to Greensboro. App. 239a. As a result changes were necessary to "fix" Guilford County which was divided into three separate districts. McMahan's draft plan in the House already extended District 12 to High Point and Greensboro, but did not include Winston-Salem. App. 235a. When it was decided there was no good reason not to incorporate loyal Democrats from the entire Triad region, the undesirable triple split of Guilford County was eliminated and Cooper 3.0, which became the final Senate plan, was the resulting configuration. Additionally, this design did not waste Democratic voters in the surrounding heavily Republican districts; it satisfied the affected Republican incumbents; and it benefited the Democratic African-American incumbent. *See* App. 104a-108a, 121a, 123a-124a, 127-129a, 135a-136a, 146a-148a, 154a, 195a, 200a. The move into Guilford County added 29 precincts--of which 18 were majority white. App. 199a.

[11] Early in the process it was recognized that a compact majority-minority district could be drawn in the area encompassed by District 1. *See e.g.*, App. 89a, 108a-112a, 120a-121a, 130a-135a, 142a-146a, 227a, 231a, 233a, 237a.

[12] The district also encompasses an area where the African-American population is sufficiently large and geographically compact to constitute a majority in a district. *See* App. 33a-34a. All but two of the (cont'd . . .)

similar needs and interests in the mostly rural and economically depressed counties in the State's northern and central Coastal Plain. App. 84a-87a, 112a, 139a-140a.

Agreement on the political goal of maintaining the six-six split in the State's congressional delegation was the one critical factor that made it possible for the House and Senate to agree on a plan. It is also the factor that principally determined the location and shapes of the new districts. The intense negotiations between the House and Senate throughout the redistricting process centered on partisan politics, not race. The redistricting software allowed the drafters to view voting data by precinct on the computer screen. It was this information that was used to move precincts and draw district boundaries. Projected partisan performance and protection of incumbents dominated the process not only for challenged Districts 1 and 12, but throughout the State. *See* App. 83a-87a, 91a-136a, 138a-140a, 141a-154a, 201a-211a.

C. THE DISTRICT COURT'S OPINION

There is a stark contrast between the majority opinion of the district court and that of Judge Thornburg. Judge Thornburg, who is at least equally familiar with North Carolina's local circumstances as the other judges, provided a thoughtful statement of the guiding legal principles, and, in applying the law to the evidence, concluded that plaintiffs failed to meet their burden of establishing that the legislature substantially

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counties included in the district are §5 covered counties, and the first districting plan submitted in 1991, which was objected to by the Department of Justice because it did not contain two majority-minority districts, included one majority-minority district in roughly the same area.

disregarded legitimate districting criteria and subordinated such criteria to improper racial motivation.

By contrast, intent on justifying its previous summary judgment blunder, the majority's "new" opinion closely tracks its prior summary judgment opinion. *Compare* App. 11a-19a, 246a-255a. It once again relies primarily on inferences it drew from the districts' racial demographics and shapes to find that race predominated in the redistricting process. The court details at length the racial make-up of counties and towns split between District 12 and surrounding districts, as well as between District 1 and its surrounding districts. From these racial demographics the court accepted the proposition of plaintiffs' expert Dr. Weber that a racial motivation predominated.[13]

To find a predominant racial motive, the district court also continued to focus on registration data for a handful of

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[13] As noted by Judge Thornburg, Weber's "ingrained" personal bias, as well as his belief that legislative bodies should not be trusted to draw district lines, undermines the credibility of his conclusions and criticisms. App. 49a-50a & n.20. Weber's testimony also was fatally flawed for two other reasons. First, Weber presumed a predominant racial motive and failed to consider any hypothesis other than race because he incorrectly believed that the person drawing districts could only see racial data, when in fact the computer screens could display data on political breakdowns of voter registration and actual voter performance. *See* App. 51a & n.23. Second, while the court accepted Dr. Weber's methodology for analyzing the split counties and towns based on racial data, it failed to acknowledge the report by the State's expert Dr. Peterson which used Dr. Weber's own methodology to analyze the same split counties and towns based on partisan registration and voting data, rather than racial data. This analysis established equally conclusively that Democratic performance dictated the splitting of counties and towns in both Districts 12 and 1. App. 169a-172a, 182a-185a.

precincts that border District 12, but were not included in the district despite having Democratic voter registration majorities.[14] This rationale by the court fails again to acknowledge the political reality in North Carolina that Democratic registration is not a reliable predictor of voting behavior.[15] App. 173a-174a, 206a-207a. The value of the court's analysis is further undermined by the data which shows that precincts within District 12 overall have *higher* democratic registrations than the ones preferred by the court.[16]

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[14] The court rejected the systematic boundary segment analysis offered by Dr. Peterson because it ignored the "core" of the district. However, Dr. Peterson's analysis responded directly to the court's own analysis comparing precincts along the outside of the district boundary with those inside the boundary, except that Dr. Peterson looked at all of the precincts and all of the political data, registration as well as voting results. App. 161a-167a, 178a-182a. *See Cromartie I*, 526 U.S. at __, 119 S. Ct. at 1550-51. If the analysis by Dr. Peterson is flawed because it ignores the "core" of the district, then the court's analysis is similarly flawed.

[15] The district court also rejected the State's description of District 12 as a Democratic island in a Republican sea based on what it describes as the "uncontroverted evidence" of party registration. This description is illustrated by maps showing the actual votes cast for Republican and Democratic candidates in the precincts bordering District 12. App. 213a-225a. The "exclusion" of the few bordering precincts with Democratic voting histories was explained by incumbency considerations. App. 204a-205a, 207a-209a.

[16] The registration data relied on by the court demonstrates that, with only very rare exceptions, the "excluded" precincts consistently have Democratic registration below 60%, while the adjoining precincts included in the district consistently have higher Democratic registration ranging from 60% to over 90%. On the rare occassions when a precinct within the district is between 50% and 60% in Democratic registration, the Democratic registration for each such district consistently is higher than that for its adjoining excluded precinct. Joint Exhibits 107-109.

Finally, the district court rejected out of hand the political explanations for District 12 because other “Democratic” alternatives could have been drawn. It also extrapolated inevitable considerations of race, especially with respect to District 1, into a sinister manipulation of district lines based predominantly on race.

ARGUMENT

I. THE DISTRICT COURT'S APPLICATION OF THE PREDOMINANCE STANDARD TO DISTRICT 12.

With the 2000 Federal Census now in progress and the next round of redistricting fast approaching, providing guidance to the states and lower courts to achieve some modicum of consistency in the application of this Court's predominance standard in *Shaw* litigation is a paramount consideration. The district court's decision below to apply strict scrutiny to North Carolina's District 12 presents substantial questions that warrant either plenary consideration or summary reversal.

The Constitution leaves the States with primary responsibility for the design of their federal congressional districts. U.S. CONST. art I, § 2; *see Chapman v. Meier*, 420 U.S. 1, 27 (1975). Because federal court review of districting legislation represents a "serious intrusion" into this "most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), this Court has made clear that the strict scrutiny of *Shaw* is not to be lightly applied. *See id.* at 915-16; *Cromartie I*. Rather, strict scrutiny is properly applied only when the plaintiff shows that race was the "predominant factor" in the design of the challenged district. *See Bush v. Vera*, 517 U.S. 952, 959 (1996); *Miller*, 515 U.S. at 916. This is a

"demanding" standard, *id.* at 928-29 (O'Connor, J., concurring), and this Court has directed the lower courts to use "extraordinary caution" in applying it, *id.* at 916 (maj. op.); *see id.* at 928-29 (O'Connor, J., concurring) (explaining that the standard is designed to limit strict scrutiny to "extreme instances" of racial gerrymandering).

In its eagerness to reach its preferred outcome, the court below failed to heed these directions. It wrongly equated mere consideration of race with racial gerrymandering, failed to conduct the "careful review" required in a "mixed motive" case, and failed to accord the State's legitimate districting preferences the deference to which this Court has said they are entitled. This Court should not tolerate such blatant disregard of its instructions.

A. THE DISTRICT COURT WRONGLY EQUATED MERE CONSIDERATION OF RACE WITH RACIAL GERRYMANDERING

In *Bush*, this Court held that proof that the State considered race in designing the challenged district is not sufficient to trigger the strict scrutiny of *Shaw*. *See Bush*, 517 U.S. at 958 (plur. op.); *id.* at 993 (O'Connor, J., concurring); *id.* at 1008-09 (Stevens, J., dissenting); *id.* at 1064-66, 1072-74 (Souter, J., dissenting). A majority of this Court also held that proof the State intentionally designed the district to have a certain racial composition is not sufficient. *See id.* at 958 (plur. op.); *id.* at 993 (O'Connor, J., concurring); *id.* at 1008-09 (Stevens, J., dissenting); *id.* at 1064-66, 1072-74 (Souter, J., dissenting). Instead, strict scrutiny applies only when the plaintiff establishes that the state *substantially* disregarded traditional redistricting criteria in drawing the challenged district lines, and that it did so *predominantly* for reasons of race. *Id.* at 958-59, 962-63 (plur. op.); *id.* at 993-94 (O'Connor, J., concurring); *id.* at 1011-12 (Stevens, J., dissenting); *id.* at 1058 (Souter, J., dissenting).

On remand, the district court completely ignored these teachings, just as it had at the summary judgment stage. Instead, it once again permitted plaintiffs to satisfy their burden simply by showing that the challenged district was somewhat irregular in shape, and that the State had considered race in designing it. App. 23a-29a. It wrongly equated evidence that North Carolina's legislative leaders had *considered* race in designing the plan as a whole and that they were *aware* of the racial composition of the districts they were drawing, with evidence that race had *predominated* in that process.[17]

The district court's application of the threshold test for strict scrutiny conflicts with this Court's decision in *Bush*. It also conflicts with the decisions of the other courts that have applied the "predominant factor" test in the wake of *Bush*. *See, e.g., Chen v. City of Houston*, 206 F.3d 502, 505-06 (5th Cir. 2000)

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[17] For example, the court cites Senator Cooper's statement that the plan "provides for a fair geographical, racial, and partisan balance" as evidence that race "predominated" over traditional political considerations in the districting process. App 8a.-9a, 27a; *see also* App. 129a-130a. Similarly, the court cites an e-mail message from Gerry Cohen to Senator Cooper, in which Cohen discusses the exact racial makeup of District 1 and states that he has "moved the Greensboro Black community into the 12th," as evidence that the Plan's "chief architects" employed "a methodology for segregating voters by race," which they "applied . . . to the 12th District." App. 27a. As Judge Thornburg pointed out in dissent, App. 47a-48a & n.18, this evidence shows at best that race was considered--along with a number of other factors--in designing District 12. It does not come close to establishing that race *predominated* over those other factors.

(reading *Bush* as establishing that proof the State considered race in the districting process, or even intentionally created a district of a certain racial composition, is not sufficient to trigger the strict scrutiny of *Shaw*); *Theriot v. Parish of Jefferson*, 185 F.3d 477, 488 (5th Cir. 1999) (same), *petition for cert. filed*, 68 U.S.L.W. 3491 (U.S. Jan. 18, 2000) (No. 99-1203); *Clark v. Calhoun* Co., 88 F.3d 1393, 1404 n.2 (5th Cir. 1996) (same); *Quilter v. Voinovich*, 981 F. Supp. 1032, 1044 (N.D. Ohio 1997) (same), *aff'd* 523 U.S. 1043 (1998).

B. THE DISTRICT COURT FAILED TO CONDUCT THE "CAREFUL REVIEW" REQUIRED IN A "MIXED MOTIVE" CASE

In *Bush*, this Court recognized that the "predominant factor" standard is particularly difficult to apply in cases where the state concedes that race was a factor in the design of the challenged district, but asserts that other legitimate districting considerations--such as a desire to protect incumbents and a desire to produce a certain partisan balance in the delegation--also played an important role. *See* 517 U.S. at 959 (plur. op.); *id.* at 1013 (Stevens, J., dissenting). The problem is particularly acute where, as here, the evidence reveals that there is a strong correlation between race and partisan political preference in the state. In such a case, the court must conduct a "careful review" of the evidence to determine whether it was race or politics that was most important in the district's design. *Id.* at 959, 967-68 (plur. op.); *id.* at 1031-32 (Stevens, J., dissenting); *id.* at 1060-61 (Souter, J., dissenting). Evidence that the district's lines correlate with race, and that the State was aware of that correlation, will not trigger the strict scrutiny of *Shaw*, if the evidence establishes that the lines were in fact drawn on the basis of partisan political data, like past voting patterns, rather than race. *Id.* at 967-68 (plur.op.); *id.* at 1027-29 (Stevens, J., dissenting); *id.* at 1059-60 (Souter, J., dissenting).

When this Court reversed the district court's grant of summary judgment in this case, it specifically noted that this was a mixed motive case governed by the *Bush* analysis. *See Cromartie I*, 526 U.S. at __,119 S.Ct. at 1551. It reiterated that evidence that there was a significant correlation between the district's lines and race, and that the State was aware of that correlation, would not suffice to trigger strict scrutiny, if the evidence also showed a high correlation between race and party preference on election day. *Id.*

On remand, the district court completely ignored this aspect of *Bush*, just as it had at the summary judgment stage. Instead, it once again failed to conduct the "careful review" that *Bush* requires in a "mixed motive" case.[18] Indeed, the opinion it issued on remand is virtually identical to the one it issued at the summary judgment stage. While it has been modified to include a brief summary of the evidence presented at trial, App. 5a-10a, it is unchanged in its essential structure and reasoning, and it repeats many of the errors made in the earlier version, ignoring this Court's warnings in *Cromartie I*.[19]

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[18] Incredibly, the district court's opinion on remand cites *Bush* only once -- for the proposition that a state cannot use race as a proxy for political characteristics in drawing district lines. App. 29a n.9.

[19] For example, the court continues to cite party *registration* data to justify rejecting the State's evidence that partisan political behavior, and not race, was the predominant factor in the design of District 12, App. 13a-14a, even though this Court criticized it for doing so at the (cont'd . . .)

The district court's decision conflicts with this Court's explicit instructions in *Cromartie I*, with its decision in *Bush*, and with the decisions of other courts that have applied the "predominant factor" test in "mixed motive" cases after *Bush*. *See, e.g.*, *Chen*, 206 F.3d. at 506-07 (reading *Bush* as requiring the court to engage in a more searching inquiry when the state has presented credible evidence of a nonracial explanation for the irregularities in the district's lines); *Theriot*, 185 F.3d at 484-86 (conducting such a careful review).

C. THE DISTRICT COURT FAILED TO GIVE SUFFICIENT DEFERENCE TO THE STATE'S DISTRICTING PREFERENCES

As this Court has long recognized, the Constitution commits primary responsibility for the design of a state's congressional districts to the political branches of the state's own government, not the federal courts. *See Miller*, 515 U.S. at 915; *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Chapman*, 420 U.S. at 27. When a federal court reviews a state's plan for compliance with the Constitution, it is therefore required to give as much respect as possible to the state's districting preferences, *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); to give substantial deference to the state's judgment on how best to balance the competing interests at stake, *Miller*, 515 U.S. at 915; and to resist the temptation to substitute its own judgment for that of the state's elected representatives, *id.*

The court below failed utterly to abide by these time-honored principles. While it purported to respect the State's

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summary judgment stage, because the evidence showed that "in North Carolina, party registration and party preference do not always correspond." 526 U.S. at __, 119 S.Ct. at 1551.

desire to create a Democratic district in the Piedmont Crescent area of the State, it failed to accord even minimal deference to the State legislature's judgment as to how best to design such a district. It questioned the legislature's judgment on the margin of error required to ensure that the district would be "safe" for Democratic candidates, insisting that the district was "too Democratic" and that the legislature was "wasting" Democratic votes. App. 116-118a; Trial Tr. at 162-63. It questioned the legislature's judgment on the precise precincts that should be included in the district, insisting that the district should have included some precincts that it did not. App. 13a, 17a, 25a.[20] It questioned the legislature's judgment on how compact the district should be, insisting that the district should have been more compact.[21] And it questioned the legislature's judgment that the district should preserve as much of the geographic core of former District 12 as possible, insisting that the district bore too much of a resemblance to its predecessor. App. 24a-25a.[22]

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[20] In the court's view, the district should have included several precincts in Mecklenburg, Forsyth, and Guilford Counties in which a majority of the registered voters were Democratic. As the undisputed evidence showed, however, the legislature used actual voting patterns, rather than party registration data, to decide which precincts to include.

[21] In the court's view, "a much more compact, solidly Democratic 12th District *could* have been created," App. 26a, and therefore *should* have been created.

[22] The implication of the court's analysis, as the dissenting judge pointed out, is that the State was required to start over from scratch when it redrew its congressional districts in the remedial stage of *Shaw II*. App. 43a-44a (calling this the "footprint" argument). That is not the law. As this Court has made clear in other contexts, the State was required (cont'd . . .)

The district court's decision flies in the face of a long line of redistricting cases from this Court. In addition, it runs afoul of this Court's repeated admonitions that a federal court exercising its power to enforce the Constitution against a state must give as much respect as possible to the state's interest in managing its own affairs. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 88 (1995); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). This Court should not tolerate such an unwarranted intrusion into the State's constitutionally conferred discretion to decide how best to design its congressional districts.

D. THE EVIDENCE PRESENTED AT TRIAL WAS LEGALLY INSUFFICIENT TO SUPPORT A FINDING THAT RACE WAS THE PREDOMINANT FACTOR IN DESIGNING DISTRICT 12

At trial, the plaintiffs based their claim that race had predominated in the design of District 12 on circumstantial evidence, just as they had at the summary judgment stage. Once again, they presented evidence that the district had a

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to do nothing more than make the adjustments necessary to bring the existing plan into compliance with the Constitution; it was not required to discard that plan altogether and start over on a clean slate. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("[A] State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional . . . should not be restricted beyond the clear commands of the Equal Protection Clause"); *Burns v. Richardson*, 384 U.S. 73, 85 (1966) (same); *see* also *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (in crafting a remedy for a constitutional violation, a court may not require the state to do more than is reasonably necessary to remedy the precise violation found); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) (same). A contrary rule would make it virtually impossible for a legislature to pass a remedial plan, for incumbents will always demand that the cores of their districts be preserved, and any plan that fails to do so is sure to face defeat in the legislature. App. 43a-44a & n.14.

somewhat irregular shape, that it had relatively low scores on standard mathematical tests of compactness, and that there was some correlation between its lines and race. Once again, the centerpiece of their circumstantial case was the testimony of Dr. Ronald Weber, who opined, based on his examination of certain demographic and political data, that race must have played a more important role in the design than partisan political preference. Once again, the court based its conclusion on an examination of a few select precincts along the district's borders, rather than all of them, and on party registration figures, rather than actual voting results. Once again, plaintiffs attempted to bolster their circumstantial evidence with the testimony of various individuals who had not been involved in the district's design, testimony which was completely lacking in probative value. App. 49a n.19. Once again, they failed to offer direct evidence that race had been the predominant factor in the district's design.[23]

In contrast, the State presented substantial and credible evidence that considerations other than race--in particular, the desire to draw a "safe" district for Democrats in the Piedmont Crescent, without destroying the core of any existing district or pitting incumbents against each other--had been most important in the district's design. This evidence included extensive testimony from the two legislative leaders, App. 81a-154a,

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[23] The only "direct" evidence plaintiffs produced were the references to race in Senator Cooper's statement to the House committee and the Cohen e-mail. *See* note 17 *supra*. As noted earlier, while this evidence shows that race was *considered* in the district's design, it says nothing about the relative importance of race *vis a vis* the various other factors that were also considered.

who were the principal architects of the 1997 plan, men whose credibility the court had no basis for doubting. *See Miller*, 515 U.S. at 916 (districting is a difficult task requiring the exercise of political judgments necessary to balance competing interests and the good faith of the state legisulature must be presumed). It also included the testimony of an unbiased statistical expert, Dr. David Peterson, who concluded that the demographic and political data before the court did not support the proposition that race had been more important than politics in the district's design. App. 155a-194a; *see also* App. 48a. In addition, the State demonstrated through cross-examination that the opinion of the plaintiff's expert was based on incorrect and incomplete information and that his conclusions were dubious at best. App. 49a-52a.

The evidence that race had predominated in the design of District 12 is dramatically weaker than that which this Court has previously found sufficient to trigger the strict scrutiny of *Shaw*.[24] No other court has ever found the *Miller* standard satisfied by such a minimal showing. *See, e.g., Chen*, 206 F.3d 502; *Theriot*, 185 F.3d 477; *Quilter*, 981 F. Supp. 1032. This

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[24] There was no evidence that the State had ever annouced that race was its dominant concern. *Compare Shaw II*, 517 U.S. at 906 (State's preclearance submission announced that its "overriding purpose" was to create a majority-minority district); *Bush*, 517 U.S. at 969-70 (plur. op.) (State's preclearance submission announced that its primary goal was to maximize black voting strength, and state officials testified in related litigation that race was the "primary consideration" in the challenged district's design). Nor was there any evidence that the Department of Justice pressured the State to make race its primary consideration. App. 118a-119a. *Compare Miller*, 515 U.S. at 917-18 (detailing evidence that State had acquiesced to pressure from the Department of Justice to maximize black voting strength).

Court should make clear that the strict--and highly intrusive--scrutiny of *Shaw* is not to be so lightly invoked.

II. The District Court's Application Of Strict Scrutiny To District 1.

The district court's decision to apply strict scrutiny to District 1 for the sole reason that it was intentionally designed as a majority-minority district presents a substantial question that warrants either plenary consideration or summary reversal.

The Court in *Shaw I* acknowledged that districting plans are always drawn with an awareness of race, 509 U.S. at 646, and expressly refused to hold that "'the intentional creation of majority-minority districts, without more', always gives rise to an equal protection-claim." *Id.* at 649. Since that time, a majority of this Court has stated that the intentional creation of a minority district does *not* automatically subject a redistricting plan to strict scrutiny. Several lower courts faced with the intentional creation of districts with a particular racial composition have followed this Court's lead, holding that the intentional creation of minority districts based on Voting Rights Act considerations did not subordinate other traditional districting criteria and trigger strict scrutiny. *See* cases cited in Arg. IA, *supra* at 13-15. In stark contrast to the discussions in *Chen*, *Theriot*, *Clark* and *Quilter*, the district court below found that intentionally maintaining a total African-American population of over 50% in District 1 automatically required strict scrutiny. App. 31a.

Drawing District 1 as a majority-minority district was predicated primarily on the knowledge that the State could "draw a nice, compact district that made geographic sense, that put together communities of interest, that was a strongly leaning Democratic district, [and] that was slightly majority-minority." App. 109a; *see also* note 11 *supra*.[25] The district is compact; it is contiguous; and it recognizes political and other common interests of the people in the State's inner coastal plain. The State's adherence to traditional districting principles was conceded by the district court, which found that District 1 satisfied objective measures of compactness and encompassed an area where the African-American population "is sufficiently large and geographically compact to constitute a majority in a congressional district," App. 19a, 33a-34a; and further, that the "irregularities" in the shape of District 1 were the result of protecting the incumbent, a white Republican, in District 3, App. 18a-19a. The district court's acknowledgment that the district "also address[ed] other traditional, political considerations," App. 34a, is at odds with its conclusion that considerations of race improperly predominated the districting process.

The district court's application of strict scrutiny to District 1 demonstrates that confusion still exists among the lower courts on the question of whether every district intentionally drawn with Voting Rights Act considerations in mind must be subjected to strict scrutiny. *Compare DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (strict scrutiny does not apply to intentional creation of compact majority-minority districts based on Voting Rights Act considerations), *summarily aff'd*, 515 U.S. 1170 (1995). This issue needs to be clarified for the state legislatures and the trial courts before the new round of redistricting begins in earnest after the 2000 Federal Census.

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[25] The plaintiffs stipulated for purposes of trial that: the African-American population is politically cohesive; the white majority votes sufficiently as a block to often enable it to defeat the minority's preferred candidate; for many decades African-Americans in North Carolina were victims of racial discrimination; and a substantial majority of the State's African-American population is still at a disadvantage in comparison to white citizens with respect to income, house, education, and health. App. 34a.

III. CLAIM PRECLUSION BY VIRTUAL REPRESENTATION BARS PLAINTIFFS' DISTRICT 12 CLAIM.

This case raises important issues concerning the ability of persons "virtually represented" by the parties to a final judgment holding a state's proposed redistricting plan constitutional to continue challenging that plan until they achieve the results they seek. This Court should grant plenary review and reverse the district court so that plaintiffs and others in similar situations cannot manipulate the federal judicial system to prevent the validity of a districting plan from being resolved unless they obtain a result to their liking.

Under elementary principles of claim preclusion, the final judgment entered in *Shaw* extinguished any claims the *Shaw* plaintiffs had with respect to the validity of District 12 in the 1997 Plan. This Court has explained that claim preclusion "rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations" and dictates that parties to a suit in which a final judgment is entered, and their privies, are forever "bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might have been offered for that purpose.*'" *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948) (emphasis added)

Contrary to these fundamental principles of claim preclusion, the district court held that *Shaw*'s final judgment had no preclusive effect, explaining that the *Shaw* court "was not presented with a continuing challenge to the redistricting plan." App. 2a-3a. In so doing, the district court ignored the actual ruling of the *Shaw* court--that the 1997 Plan "adequately remedied the specific constitutional violations" this Court found in the prior District 12, App. 312a--as well as the elemental rule that claim preclusion bars claims that *could have been* brought.

The *Shaw* plaintiffs' choice not to assert their claims against the 1997 Plan could not save those claims from preclusion. The final judgment entered in *Shaw* equally bars the claims of the District 12 plaintiffs in this case, plaintiffs Froelich, Everett, and Linville[26]. Although they were not parties to *Shaw*, their interests were more than "adequately represented by" the *Shaw* plaintiffs under circumstances such that they were "in privity" with the *Shaw* plaintiffs. *Cf. Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). While "virtual representation" is the exception, this type of public interest case involving closely allied plaintiffs and tactical maneuvering presents a classic situation for its application. Plaintiff Froelich is a long-time business associate and friend of lead counsel Robinson Everett, who was also lead counsel and a plaintiff in

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[26] Plaintiff Linville is in fact not a resident of District 12. App. 341a. Although the majority of the district court treated the issue as moot, *see* App. 31a n.10, the status of Mr. Linville's role in this case was discussed by Judge Thornburg in his dissenting and concurring opinion. *See* App. 64a-67a. Regardless, Linville's stated reasons for objecting to the district clearly did not show any cognizable injury related to District 12 in the 1997 Plan. *See* App. 339a-41a.

Shaw. Froelich knew of the *Shaw* litigation while it was going on, discussed it with his old friend, advised Everett he was willing to be a plaintiff, and participated in *Shaw* through a filed declaration. App. 335a-37a. Similarly, plaintiff Reuben Everett is a first cousin of attorney Everett. He too knew his cousin was litigating *Shaw*, and he became a plaintiff in this case because attorney Everett "called me and said he needed a plaintiff in Rowan County." App. 331a-34a.

The principle that persons such as plaintiffs Froelich and Everett may be bound through the concept of "virtual representation" is based on a variety of factors including "'participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, [and] close relationships between the parties and nonparties.'" *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (quoting 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4457 at 494-99 (2d ed. 1987)). Here, plaintiffs Froelich and Everett certainly "had actual . . . notice of the earlier litigation" and "the balance of the relevant equities tips in favor of preclusion." *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994).[27]

Significantly, two key additional factors here exemplify the situations in which plaintiffs may be appropriately held to be in privity through "virtual representation." First, this is a public interest type of suit addressed to a general constitutional issue

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[27] Lower courts have recognized that this result is entirely consistent with this Court's decisions in *Richards* and *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999). *See Tyus v. Schoemehl*, 93 F.3d 449, 455 (8th Cir. 1996); *Louisiana Seafood Management v. Foster*, 53 F. Supp. 2d 872, 877 (E.D. La. 1999).

rather than the type of individualized (financial) harm this Court considered in *Richards* and *South Central Bell*. Thus, it involves the type of issue for which "the number of plaintiffs with standing is potentially limitless." *Tyus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996). "Holding preclusion inapplicable in this context would encourage fence-sitting, because nonparties would benefit if the plaintiffs were successful but would not be penalized if the plaintiffs lost."[28] *Id.* (applying "virtual representation" to bar statutory and constitutional vote dilution claims against alderman boundaries) (quoting *Petit v. City of Chicago*, 766 F. Supp. 607, 613 (N.D. Ill. 1991)). If the parties and attorneys involved in these public interest suits could simply continue to recruit new plaintiffs to pursue the same challenges, such "claims would assume immortality." *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731, 741 (9th Cir. 1984) (applying "virtual representation" in school desegregation context). *See also NAACP, Minneapolis Branch v. Metropolitan Council*, 125 F.3d 1171 (8th Cir. 1997) (segregated housing and education); *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990) (flying of confederate flag); *Louisiana Seafood Management v. Foster*, 53 F. Supp. 2d 872 (E.D.La. 1999) (gill-net ban law); *Petit*, 766 F. Supp. 607 (alleged discrimination in hiring and promoting); *Environmental Defense Fund, Inc. v. Alexander*, 501 F. Supp. 742 (N.D. Miss. 1980) (environmental challenge to navigation project).

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[28] The benefit to nonparties was both recognized and intended by lead plaintiff Cromartie, who viewed both *Shaw* and this suit as being very much like class actions in which they were effectively representing all the voters of the districts and even of the State. App. 327a-28a.

The second critical additional factor present here is the tactical maneuvering by which plaintiffs and their allies sought to achieve an advantage allowing them to continue litigating with a clean slate. Thus, the *Shaw-Cromartie* challengers *refused* to pursue their claims against the 1997 Plan in *Shaw*, choosing instead to pursue them in this suit with the same counsel, with overlapping plaintiffs and with additional plaintiffs closely affiliated with the *Shaw* litigants.[29] Such tactical maneuvering weighs in favor of applying "virtual representation" because, otherwise, "it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group." *Tyus*, 93 F.3d at 457. *See also Petit*, 766 F. Supp. at 612-13; *Louisiana Seafood Management*, 53 F. Supp. at 884. The federal courts are not playgrounds in which litigants can frolic until they maneuver their claims into a favorable position, and this Court should not allow such manipulative efforts to succeed.

The policies behind the doctrine of claim preclusion are at their most compelling when the claims in question seek to interfere with a state's electoral processes. The strong public interest in the orderly administration of the nation's electoral machinery requires efficient and decisive resolution of disputes regarding these matters. In this case, plaintiffs were more than adequately represented in *Shaw*, and they should not be allowed to exploit the judicial system to delay final resolution of the legal controversy over North Carolina's congressional districts, contrary to claim preclusion's basic purposes of judicial economy and finality. This Court should grant plenary review or summarily reverse because plaintiffs' claims are barred by claim preclusion based on "virtual representation."

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[29] Significantly, the additional District 1 plaintiffs were friends of Cromartie and Muse and recruited by them. App. 323a-24a, 328a-30a, 343a, 345a-46a. Moreover, counsel Robinson Everett has been lead counsel throughout these cases and indeed appears to have been the guiding force from its inception, serving also as a plaintiff in *Shaw* and consulting with and at times hand-picking the *Cromartie* plaintiffs. App. 327a, 333a. *See Tyus*, 93 F.3d at 457; *Petit*, 766 F. Supp. at 612 n. 6. Of course, mere identity of counsel does not necessarily result in claim preclusion. *See South Central Bell Tel. Co.*, 119 S. Ct. at 1185. In this case, however, the identity of counsel is part of the total picture of close affiliation establishing that plaintiffs' interests were more than adequately represented in *Shaw* and that it is equitable for them to be bound by the results in *Shaw*.

IV. THE DISTRICT COURT'S DECISION ON REMEDY.

The district court's decision to require the State of North Carolina to redraw its congressional districting plan yet again -- in the middle of its election cycle and on the eve of the new decade -- was an egregious abuse of its remedial discretion. This Court has long made clear that, in crafting a remedy for a constitutional violation in a state's existing districting schemes, a federal court must take care not to unduly disrupt the state's election machinery by ordering it to make "precipitate changes." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Once "an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief." *Id.* The district court flouted this advice by ordering adoption of a new plan for 2000 even though candidate filing had closed, campaigning had begun, and absentee balloting was soon to begin. North Carolina had already been improperly forced to hold its 1998 elections under a plan different from both the 1996 elections and the 1997 Plan. Requiring yet another plan this year-- which now would result in voiding this year's May primaries -- could only further confuse voters, limit candidates' abilities to communicate with those voters, and depress voter turnout.

The district court's decision egregiously forces the State to adopt yet another new congressional plan when the new plan would be based on outdated census data from ten years ago and would itself be replaced in 2002 by a plan based on 2000 census data. *See Abrams v. Johnson*, 521 U.S. 74, 100-01 (1997) (noting effect of census data six years out of date on equipopulation claim). This Court should summarily reverse the district court's remedial order and permit North Carolina to go forward with its 2000 elections under the 1997 Plan.

CONCLUSION

For the forgoing reasons, this Court should summarily reverse the judgment of the district court. In the alternative, this Court should note probable jurisdiction of this appeal.

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APPENDIX

APPENDIX

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OPINIONS OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, MARCH 7, 2000

[Caption Omitted in Printing]

OPINION

BOYLE, Chief District Judge:

This matter is before the Court on remand from the United States Supreme Court's order holding that the underlying case was not suited for summary disposition and ordering this Court to conduct further proceedings. *Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 143 L.Ed. 731 (1999). The underlying action challenges the congressional redistricting plan enacted by the General Assembly of the State of North Carolina on March 31, 1997, contending that it violates the Equal Protection Clause of the Fourteenth Amendment, and relying on the line of cases represented by *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L.Ed.2d 207 (1996) (*"Shaw II"*), and *Miller v. Johnson*, 515 U.S. 900, 904, 115 S. Ct. 2475, 2482, 132 L.Ed.2d 762 (1995).

Following the Supreme Court's decision to remand, the parties undertook a new round of discovery, ending in October, 1999. Between November 29 and December 1, 1999, a trial was held before this Court.

BACKGROUND

In *Shaw II* the United States Supreme Court held that the Twelfth Congressional District created by the 1992 Congressional Redistricting Plan (hereinafter, the " 1992 Plan") was race based and could not survive the required "strict scrutiny." 517 U.S. 899, 116 S. Ct. 1894. The five plaintiffs in *Shaw* lacked standing to attack the other majority-minority district (the First Congressional District under the 1992 Plan) because they were not registered voters in the district. *Id.*

Soon after the Supreme Court ruled in *Shaw II*, three residents of Tarboro, North Carolina, filed the original Complaint in this action on July 3, 1996. These original Plaintiffs resided in the First Congressional District (alternatively, "District 1 ") as it existed under North Carolina's 1992 Plan. The Plaintiffs charged that the First Congressional District violated their rights to equal protection under the United States Constitution because race predominated in the drawing of the District. The action was stayed pending resolution of remand proceedings in *Shaw v. Hunt*, and on July 9, 1996, the same three Tarboro residents joined the Plaintiffs in *Shaw* in filing an Amended Complaint in that case, similarly challenging District 1.

By Order dated September 12, 1997, the three-judge panel in *Shaw* approved a congressional redistricting plan enacted on March 31, 1997, by the General Assembly as a remedy for the constitutional violation found by the Supreme Court to exist in the Twelfth Congressional District (alternatively, "District 12"). The *Shaw* three-judge panel also dismissed without prejudice, as moot, the plaintiffs' claim that the First Congressional District in the 1992 Plan was unconstitutional. Although it was a final order, the September 12, 1997, decision of the *Shaw* three-judge panel was not preclusive of the instant

cause of action, as the panel was not presented with a continuing challenge to the redistricting plan.[1]

On October 17, 1997, this Court dissolved the stay previously entered in this matter. On the same day, two of the original three Plaintiffs, along with four residents of District 12, filed an amended Complaint challenging the 1997 remedial congressional redistricting plan (the "1997 Plan"), and seeking a declaration that the First and Twelfth Congressional Districts in the 1997 Plan are unconstitutional racial gerrymanders. A three-judge panel was designated by order of the Chief Judge of the Fourth Circuit Court of Appeals, dated January 23, 1998.

The Plaintiffs moved for a preliminary injunction on January 30, 1998, and for summary judgment on February 5, 1998. Defendants filed for summary judgment on March 2, 1998, and a hearing on these motions was held on March 31, 1998. On April 3, 1998, a majority of the three-judge panel issued an Order and Permanent Injunction finding that the Twelfth Congressional District under the 1997 Plan was unconstitutional and granting Plaintiffs summary judgment as to that district. The Order and Permanent Injunction also granted Plaintiffs' Motion for Preliminary Injunction and granted Plaintiffs' request for a Permanent Injunction, thereby enjoining Defendants from conducting any primary or general election for congressional offices under the 1997 Plan. Finally, the Court ordered the parties to file a written submission addressing an appropriate time period within which the North Carolina General Assembly would be allowed the opportunity to correct the constitutional defects in the 1997 Plan, and to present a proposed election schedule to follow redistricting which provided for a primary election process culminating in a general congressional election to be held on the date of the previously scheduled general election.

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[1] In its final Memorandum Opinion the three-judge panel in *Shaw* noted that there was "no substantive challenge to the [1997] plan by any party to this action," and closed by explicitly "noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not-cannot-run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12." *Shaw v. Hunt*, No. 92202-CIV-5-BR, at 8 (E.D.N.C. Sept. 12, 1997)

Defendants filed a Motion to Stay the April 3 Order, which was denied by this Court on April 6, 1998. On that date, Defendants appealed the denial of their Motion to Stay to the United States Supreme Court, which upheld this Court's denial on April 13, 1998. *Hunt v. Cromartie*, 523 U.S. 1068, 118 S.Ct. 1510, 140 L.Ed.2d 662 (1998).

On April 14, 1998, this Court issued a Memorandum and Opinion issuing its findings of fact and conclusions of law regarding the April 3, 1998 order and denying Plaintiffs' Motion for Summary Judgment with regard to the First Congressional District under the 1997 Plan. On April 17, 1998, Defendants filed a motion asking the Court to reconsider its April 6 order. On April 21, this Motion to Reconsider was denied.

On April 21, 1998, the Court issued a scheduling order, requiring that the General Assembly either submit a new plan to the Court and the Department of Justice by May 22, 1998 or the Court would assume responsibility for drawing an interim plan. On May 22, 1998, Defendants submitted the 1998 Congressional Redistricting Plan ("the 1998 Plan"). The 1998 Plan contained a clause stating that, in the event that the United States Supreme Court found for the State in its appeal, the 1998 Plan would no longer be ordered and thus North Carolina's congressional districts would revert to the 1997 Plan.

On October 19, 1998, the Court granted a joint motion to stay all proceedings in this action pending a decision by the United States Supreme Court in *Hunt v. Cromartie*, docketed in the Supreme Court on September 16, 1998 as No. 98-450.

On May 17, 1999 the United States Supreme Court entered an order holding that the underlying case was not suited for summary disposition and ordering this Court to conduct further proceedings. *Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545, 143 L.Ed. 731 (1999).

In compliance with the Supreme Court's decision, a three day bench trial was held in this matter, from November 29 to December 1, 1999. Plaintiffs called eight witnesses. Plaintiffs' first witness was Senator Hamilton Horton, a resident of Forsyth County and longtime member of the North Carolina General Assembly. Senator Horton testified as to his belief that Forsyth County and Winston-Salem were split along racial lines in the 1997 Plan and that District 12 was created with a predominantly racial motive.

Plaintiffs' second witness was Representative Steve Wood, a resident of High Point, North Carolina. Representative Wood testified that in 1997 he served in the North Carolina General Assembly in a leadership position. Representative Wood ran for Congress in the Twelfth District under the 1998 Plan and is convinced that the 1997 Plan divided High Point and Guilford County along racial lines for a predominantly racial motive.

As their third witness, Plaintiffs called Representative John Weatherly of King's Mountain, North Carolina, a member of the North Carolina General assembly during the consideration of the 1997 and 1998 redistricting plans who had previously served on a commission considering the State's legislative process. Representative Weatherly testified that he introduced legislation to facilitate the redistricting process through the use of a redistricting commission and that, on the basis of his political and legislative experience, he believed that both Districts 1 and 12 were drawn with a predominantly racial motive.

Plaintiffs' fourth witness was R. O. Everett, a longtime resident of Salisbury, North Carolina who has been active in politics and has run for the state legislature. Mr. Everett testified that he was familiar with the congressional districts in the Salisbury and Rowan County areas and is convinced that District 12 was drawn with a predominantly racial motive.

Plaintiffs' fifth witness was J.H. Froelich Jr., a lifetime resident of High Point, NC who testified that he has been active in state and local politics and believes that Guilford County

was divided with a predominantly racial motive in both the 1992 and 1997 Plans and that the 1997 Plan's District 12 was drawn with a predominantly racial motive.

Plaintiffs' sixth witness was Neil Williams, a resident of Charlotte who served on its city council, is familiar with the Mecklenburg County precincts, and ran for Congress in the 1992 Plan's District 9. Mr. Williams testified that he is convinced that Mecklenburg County was divided along racial lines with a predominant racial motive and that the 1997 Plan's District 12 was drawn with a predominantly racial motive.

Plaintiffs' seventh witness was Don Frey of the North Carolina General Assembly's Information Systems Division, who presented statistical data from the General Assembly's database, including relative numbers of persons moved from the 1992 Plan to the 1997 Plan, and current precincts split by the 1997 Plan.

Plaintiffs' eighth and final witness, whose testimony carried over into the second day of trial, was Dr. Ronald Weber of the University of Wisconsin. Dr. Weber testified as an expert political scientist who has studied, consulted on, and testified in many redistricting cases. Referring to maps and other data, Dr. Weber testified that race predominated in the construction of Districts 1 and 12 under the 1997 Plan, and that cities, counties and precincts were divided along racial lines. Dr. Weber concluded that no motivation other than race could adequately explain the legislature's decisions to include, exclude, or split certain precincts.

Beginning on November 30, the second day of trial, the Defendants called four witnesses.

Defendants' first witness was Senator Roy Asberry Cooper, III, who testified as to the legislative history and enactment of the 1997 Plan in the North Carolina Senate, focusing on the creation of Districts 1 and 12. Senator Cooper testified that he was unsure whether he could get the 1997 Plan pre-cleared by the Justice Department without creating a majority-minority First District. Senator Cooper's testimony also brought to light a February 10, 1997 e-mail message (the "Cohen-Cooper E-mail") sent to him by Director of Bill Drafting Gerry Cohen, a state employee charged with the technical aspect of drawing the districts in 1991, 1992, and 1997 Plans. The Cohen-Cooper E-mail stated, in part, that "By shifting areas in Beaufort, Pitt, Craven and Jones Counties, I was able to boost the minority percentage in the first district from 48.1 % to 49.25%. The district was only plurality white, as the white percentage was 49.67%." (Exhibit 58; Trial Transcript at 438) The e-mail continues, "This was all the district could be improved by switching between the 1st and 3rd unless I went into Pasquotank, Perquimans, or Camden. I was able to make the district plurality black by switching precincts between the 1st and 4th . . . (Exhibit 58, Trial Transcript at 438) The Cohen-Cooper e-mail also states that "I [Cohen] have moved Greensboro Black community into the 12th , and now need to take bout [sic] 60,000 out of the 12th. I await your direction on this." (Exhibit 58, Trial Transcript at 412)

The Senator stated that he did not remember receiving the Cohen-Cooper e-mail and denied having given Cohen "specific instructions."' (Trial Transcript at 413, 438)

Additionally, Senator Cooper was questioned about a statement he made to the March 25, 1997 meeting of the House congressional redistricting committee, in which he argued that the 1997 Plan "provides for a fair geographical, racial and partisan balance throughout the state of North Carolina." (Trial Transcript at 429) The Senator claimed that the term "partisan balance" referred to maintaining the six-six Democrat-Republican split in the congressional delegation, but denied that the term "racial balance" would refer to maintaining the ten-two balance between whites and African Americans. (Trial Transcript at 429-30) Senator Cooper admitted that race was "one of the factors that was considered" in drafting the 1997 Plan, and that but denied that it was the predominant factor. (Trial Transcript at 430)

Defendants began the third day of trial with their second witness, Representative W. Edwin McMahan, who testified as to the legislative history and enactment of the 1997 Plan in the North Carolina House of Representatives, especially the creation of Districts 1 and 12. Representative McMahan claimed that race was not the predominant factor in the creation of those districts.

Defendants' third witness was Dr. David Peterson of the University of North Carolina at Chapel Hill's Department of Geography and Sciences. Dr. Peterson presented a statistical analysis of data regarding the question whether race predominated over party affiliation in the construction of the 1997 Plan's District 12. Dr. Peterson also discussed the variance between Democratic registration and voting behavior, and analyzed Dr. Weber's reasoning on the predominance of race as a factor in the creation of District 12. In contrast to Dr. Weber, Dr. Peterson's conclusion was that political considerations, rather than race, might possibly account for the legislature's decisions to include, exclude, or split certain precincts.

Defendants' final witness was Gerry Cohen, Director of Bill Drafting for the North Carolina General Assembly. Mr. Cohen testified as to the legislative history and enactment of the 1997 Plan, especially with regard to Districts 1 and 12, as well as the technical aspects of redistricting, including the computer systems used.

FACTS

As discussed above, in 1992 the State of North Carolina established a new set of proposed congressional districts. This 1992 Plan created two districts, the First and the Twelfth, that were challenged by a group of plaintiffs who claimed that the State had deliberately segregated voters into districts on the basis of race without compelling justification. In *Shaw v. Reno* ("*Shaw I*"), the United States Supreme Court held that this allegation stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment. 509 U.S. 630, 658, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

On remand, the District Court found that North Carolina's Twelfth District created by the 1992 Plan classified voters by race, but that the plaintiffs lacked standing to challenge the First District. In *Shaw II*, the United States Supreme Court affirmed this finding and farther held that the State had not established that its reapportionment scheme was narrowly tailored to serve a compelling state interest, and therefore the 1992 Plan failed the requisite "strict scrutiny" test. 517 U.S. 899, 116 S. Ct. 1894.

The North Carolina General Assembly convened in regular session on January 29, 1997, and formed redistricting committees to address the defects found in the 1992 Plan. These newly formed House and Senate Committees aimed to identify a plan which would cure the constitutional defects and receive the support of a majority of the members of the General Assembly. Affidavit of Senator Roy A. Cooper, III ("Cooper Aff.") ¶3. In forming a workable plan, the committees were guided by two avowed goals: (1) curing the constitutional defects of the 1992 Plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation. Cooper Aff. ¶¶5, 8, 10, 14; Affidavit of Gary 0. Bartlett, Executive Secretary-Director of the State Board of Elections ("Bartlett Aff."), Vol. I Commentary at 9-10.

To achieve the second goal, the redistricting committees drew the new plan (1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan. Cooper Aff. ¶14. The plan as enacted largely reflects these directives: incumbent Congressmen generally do not reside in the same district, and each district retains at least 60% of the population of the old district. Cooper Aff. ¶8, Affidavit of Representative W. Edwin McMahan ("McMahan Aff.") ¶7.

I. The Twelfth Congressional District

District 12 is one of the six predominantly Democratic districts established by the 1997 Plan to maintain the 6-6 partisan division in North Carolina's congressional delegation. District 12 is not a majority-minority district,[2] but 46.67 percent of its total population is African-American. Bartlett Aff., Vol. I Commentary at 10 and 11. District 12 is composed of six counties, all of them split in the 1997 Plan. The racial composition of the parts of the six subdivided counties assigned to District 12 include three with parts over 50 percent African-American, and three in which the African-American percentage is under 50 percent. Declaration of Ronald E. Webber [*sic*] ("Webber [*sic*] Dec.") ¶18. However, almost 75 percent of the total population in District 12 comes from the three county parts which are majority African-American in population: Mecklenburg, Forsyth, and Guilford counties. *Id.* The other three county parts (Davidson, Iredell, and Rowan) have narrow corridors which pick up as many African-Americans as are needed for the district to reach its ideal size.[3] *Id.*

Where Forsyth County was split, 72.9 percent of the total population of Forsyth County allocated to District 12 is African-American, while only 11.1 percent of its total population assigned to neighboring District 5 is African-American. *Id.* ¶20. Similarly, Mecklenburg County is split so

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[2] The Twelfth is not a majority-minority district as measured by any of three possible criteria. African-Americans constitute 47 percent of the total population of District 12, 43 percent of the voting age population of the District, and 46 percent of the registered voters in the District. Peterson Aff., at 8.

[3] An equitably populated congressional district in North Carolina needs a total population of about 552,386 persons using 1990 Census data. Weber Dec. ¶39.

51.9 percent of its total population allocated to District 12 is African-American, while only 7.2 percent of the total population assigned to adjoining District 9 is African-American.

A similar pattern emerges when analyzing the cities and towns split between District 12 and its surrounding districts: the four largest cities assigned to District 12 are split along racial lines. *Id.* ¶23. For example, where the City of Charlotte is split between District 12 and adjacent District 9, 59.47 percent of the population assigned to District 12 is African-American, while only 8.12 percent of the Charlotte population assigned to District 9 is African-American. Affidavit of Martin B. McGee ("McGee Aff."), Ex. L. And where the City of Greensboro is split, 55.58 percent of the population assigned to District 12 is African-American, while only 10.70 percent of the population assigned to District 6 is African-American. *Id.*

An analysis of the voting precincts immediately surrounding District 12 reveals that the legislature did not simply create a majority Democratic district amidst surrounding Republican precincts. For example, around the Southwest edge of District 12 (in Mecklenburg County), the legislature included within the district's borders several precincts with racial compositions of 40 to 100 percent African-American, while excluding from the district voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations. Among Mecklenburg County precincts which are immediately adjacent to District 12, but not inside it, are precincts with 58.818 percent of voters registered as Democrats, and precincts that are 56.464 percent Democratic, 54.213 percent

Democratic, 59.135 percent Democratic, 59.225 percent Democratic, 54.498 percent Democratic, 59.098 percent Democratic, 55.72 percent Democratic, 54.595 percent Democratic, 54.271 percent Democratic, 63.452 percent Democratic, and 59.453 percent Democratic. *Id.*, Ex. P. Similarly, Forsyth County precincts that are immediately adjacent to, but not inside, District 12 include precincts with 57.371 percent Democratic registration, 65.253 percent Democratic registration, 65.747 percent Democratic registration, 65.747 percent Democratic registration, 76 percent Democratic registration, 55.057 percent Democratic registration, 55.907 percent Democratic registration, 56.782 percent Democratic registration, 55.836 percent Democratic registration, and 60.113 percent Democratic registration. *Id.*, Ex. O. Finally, District 12 was drawn to exclude precincts with 59.679 percent Democratic registration, 61.86 percent Democratic registration, 58.145 percent Democratic registration, 62.324 percent Democratic registration, 60.209 percent Democratic registration, 56.739 percent Democratic registration, 66.22 percent Democratic registration, 57.273 percent Democratic registration, 55.172 percent Democratic registration, and 63.287 percent Democratic registration, all in Guilford County. *Id.*, Ex. N.

On the North Carolina map, District 12 has an irregular shape and is barely contiguous in parts. Its Southwest corner lies in Mecklenburg County, very close to the South Carolina border, and includes parts of Charlotte. The District moves North through Rowan County and into Iredell County. There it juts West to pick up parts of the City of Statesville. More than 75 percent of the Statesville population that is included in

District 12 is African-American, while only 18.88 percent of the population of Statesville excluded from District 12 is African-American. McGee Aff., Ex. L. From Statesville, the District moves East into Rowan County. There it dips to the South to include Salisbury, before turning to the Northeast and entering Davidson County and the City of Thomasville. Over 41 percent of the populations of Salisbury and Thomasville that are included in District 12 are African-American, while only 15.39 and 9.55 percent, respectively, of those that are excluded from the District are African-American. *Id.* The District makes a northwesterly incursion into Forsyth County to include parts of Winston-Salem, where 77.39 percent of the population within District 12 is African-American, and only 16.06 percent of the population left out is African-American. *Id.* The District moves to the East and narrows dramatically before opening up again to include the predominantly African-American parts of Greensboro, where the District ends.

Objective, numerical studies of the compactness of congressional districts are also available. In his report, "An Evaluation of North Carolina's 1998 Congressional Districts," Professor Gerald R. Webster, one of the Defendants' expert witnesses, presents statistical analyses of "comparator compactness indicators" for North Carolina's congressional districts under the 1997 Plan. In measuring the districts' dispersion compactness[4] and perimeter compactness,

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[4] "Dispersion compactness" measures the geographic "dispersion" of a district. To calculate this a circle is circumscribed around a district. The reported coefficient is the proportion of the area of the circumscribed circle which is also included in the district. This measure ranges from 1.0 (continued...)

Professor Webster offers two of the "most commonly recognized and applied" compactness indicators. Webster, at 13 (citing Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 Mich.L.Rev. 483, 571-573, table 6 (1993) (hereinafter, "Pildes & Niemi"); and see *Bush v. Vera*, 517 U.S. 952,-, 116 S. Ct. 1941, 1952, 135 L.Ed.2d 248 (1996) (citing Pildes & Niemi compactness factors as supporting evidence for holding three Texas congressional districts unconstitutional).

In discussing the relative normalcy of various compactness measures, Pildes and Niemi suggest that a "low" dispersion compactness measure would be equal to or less than 0. 15. Pildes & Niemi, at 564. They suggest that a "low" perimeter compactness measure is equal to or less than 0.05. *Id.* North Carolina's Twelfth Congressional District under the 1997 Plan has a dispersion compactness indicator of 0.109 and a perimeter compactness indicator of 0.041. Webster, at table 3. These figures are much lower than the mean compactness indicators for North Carolina's twelve congressional districts under the 1997 Plan. The average dispersion compactness indicator for the State is 0.354, and the average perimeter compactness indicator is 0.192. *Id.* The next lowest dispersion compactness indicator after District 12 is the 0.206 in the Fifth Congressional District, and the next lowest perimeter compactness indicator is the First Congressional District's 0.107. *Id.*

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[4] (...continued)
(most compact) to 0.0 (least compact). Webster, at 14.

[5] "Perimeter compactness" is based upon the calculation of the district's perimeter. The reported coefficient is the proportion of the area in the district relative to a circle with the same perimeter. This measure ranges from 1.0 (most compact) to 0.0 (least compact). Webster, at 14. The equation used here is ((4 x rl) x Area of district) -- (District's Perimeter2)). Webster, at table 3.

Thus, it is clear that even after the changes detailed above, the primary characteristic of the Twelfth District is its "racial archipelago," stretching, bending and weaving to pick up predominantly African-American regions while avoiding many closer and more obvious regions of high Democratic registration, but low African-American population.

II. The First Congressional District

District 1 is another predominantly Democratic district established by the 1997 Plan. Unlike District 12, it is a majority-minority district, based on percentages of the total population of the District[6] as 50.27 percent of its total population is African-American. *Id.*, Vol. I Commentary at 10. District 1 is composed of ten of the 22 counties split in drawing the statewide 12 district 1997 Plan. Weber Dec.¶16. Half of the twenty counties represented in District 1 are split. *Id.* Of the ten sub-divided counties assigned to District 1, four have parts with over 50 percent African-American population, four others have parts with over 40 percent African-American population, and two others have parts with over 30 percent African-American population. *Id.*, ¶17.

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[6] While 50.27 percent of the total population of District 1 is African-American, only 46.54 percent of the voting age population is African-American, based on the 1990 census data.

In each of the ten counties that are split between District 1 and an adjacent district, the percent of the population that is African-American is higher inside the district than it is outside the district, but within the same county. *Id.*, ¶19 and Table 2. The disparities are less significant than in the county splits involving District 12. *Id.*, Table 2. For example, where Beaufort County is split between Districts 1 and 3, 37.7 percent of the total population of Beaufort County allocated to District 1 is African-American, while 22.9 percent of the total population of Beaufort County assigned to District 3 is African-American.

Similarly, nine of the 13 cities and towns split between District 1 and its neighboring districts are split along racial lines. *Id.*, ¶22. For example, where the City of New Bern is split between District 1 and adjacent District 3, 48.27 percent of the population assigned to District 1 is African-American, while 24.49 percent of the New Bern population assigned to District 3 is African-American. McGee Aff., Ex. L.

Viewed on the North Carolina map. District 1 is not as irregular as District 12. In the North, it spans 151.2 miles across, from Roxboro, Person County, in the West, to Sunbury, Gates County, in the East. Affidavit of Dr. Alfred W. Stuart ("Stuart Aff."), table 1. It is shaped roughly like the state of Florida, although the protrusion to the South from its "panhandle" is only approximately 150 miles long (to Goldsboro, Wayne County, with two irregularities jutting into Jones, Craven, and Beaufort Counties. Cooper Aff., attachment.) These irregularities surround the peninsular extension of the Third Congressional District from the East, allowing the incumbent from the previous Third Congressional District to retain his residence within the boundaries of the same district, and avoiding placing two incumbents in District 1.

The "comparator compactness indicators" from District 1 are much closer to the North Carolina mean compactness indicators than are those from District 12. For example, District 1 has a dispersion compactness indicator of 0.3 17 and a perimeter compactness indicator of 0.107. Webster, at table 3. This dispersion compactness indicator is not significantly lower than the State's mean indicator of 0.354, and is higher than the dispersion compactness indicators of Districts 12 (0.109), 9 (0.292), and 5 (0.206). *Id.* It may be noted that Districts 5 and 9 are next to, and necessarily shaped by, District 12. District 1 has a perimeter compactness indicator of 0.107, which is lower than North Carolina's mean perimeter compactness indicator (0.192), but much higher than Pildes and Niemi's suggested "low" perimeter compactness indicator (0.05). District 1's perimeter compactness indicator is also much higher than that of District 12 (0.041). *Id.*

DISCUSSION

I. Applicable Law and Standard of Review

The Equal Protection Clause of the United States Constitution provides that no State "shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1. The United States Supreme Court explained in *Miller v Johnson*, 515 U.S., at 904, 115 S. Ct. at 2482, that the central mandate of the Equal Protection Clause "is racial neutrality in governmental decision making."

Application of this mandate clearly prohibits purposeful discrimination between individuals on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 2824, 125 L.Ed.2d 511 (1993) (*"Shaw I"*) (citing *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L.Ed.2d 597 (1976)).

As the Supreme Court recognized, however, the use of this principle in "electoral distracting is a most delicate task." *Miller*, 515 U.S., at 905, 115 S. Ct., at 2483. Analysis of suspect districts must begin from the premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition." *Shaw I*, 509 U.S., at 642, 113 S. Ct., at 2824. Beyond that, however, the Fourteenth Amendment's prohibition "extends not just to explicit racial classifications," *Miller*, 515 U.S., at 905, 115 S. Ct., at 2483, but also to laws, neutral on their face, but "unexplainable on grounds other than race," *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 564, 50 L.Ed2d 450 (1977).

In challenging the constitutionality of a State's districting plan, the "plaintiff bears the burden of proving the race-based motive and may do so either through 'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose.'" *Shaw II*, 517 U.S. at ___, 116 S. Ct. at 1900 (quoting *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488). In the final analysis, the plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* (quoting *Miller*, 515 U.S., at 916, 115 S. Ct., at 2488).

Once a plaintiff demonstrates by a preponderance of the evidence that race was the predominant factor in redistricting, the applicable standard of review of the new plan is "strict scrutiny." Thus, in *Miller* the Supreme Court held that strict scrutiny applies when race is the "predominant" consideration in drawing the district lines such that "the legislature subordinate[s] race-neutral distracting principles ... to racial considerations." 515 U.S., at 916, 115 S. Ct., at 2488. Under this standard of review, a State may escape censure while drawing racial distinctions only if it is pursuing a "compelling state interest." *Shaw II*, 517 U.S., at ___, 116 S. Ct., at 1902.

However, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, 106 S. Ct. 1842, 1850, 90 L.Ed2d 260 (1986) (opinion of Powell, J.). As the Supreme Court required in *Shaw II*, where a State's plan has been found to be a racial gerrymander, that State must now "show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its distracting legislation is narrowly tailored to achieve that compelling interest." 517 U.S., at ___, 116 S. Ct., at 1902.

We are cognizant of the principle that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S. Ct. 2493, 2497, 57 L.Ed2d 411 (1978) (citations omitted). "A State should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity. When it does take the opportunity, the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law." *Lawyer v. Dep't of Justice*, __ U.S.__, __, 117 S. Ct. 2186, 2193,138 L.Ed2d 669 (1997) (internal citations omitted).[7] Thus, when the federal courts declare an apportionment scheme unconstitutional-as the Supreme Court did in *Shaw II*-it is appropriate, "whenever

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[7] The dissent charges that we "ignore[] the principles of federalism which require federal courts to exercise restraint," and alludes to the dangers of "judicial activism." This is a disturbing accusation, as a federal court cannot shrink away from the enforcement of the United States Constitution and federal law. The standard of equal protection under law established in the latter half of the 20th century is the direct result of federal courts' defense of constitutional principles in the face of state resistance. We would point our distinguished colleague to the words of the late Judge Frank Johnson:

> It must be emphasized that, when governmental institutions fail to make . . . judgment and decisions in a manner which comports with the constitution, federal courts have a duty to remedy the violation. In summary, it is my belief that the judicial activism which has generated so much criticism is, in most cases, not activism at all. Courts do not relish making such hard decisions and certainly do not encourage litigation on social and political problems.
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> But the federal judiciary in this country has the paramount and the continuing duty to uphold the law. When a "case or controversy" is properly presented, the court may not shirk its sworn responsibility to uphold the Constitution and laws of the United States. The courts are bound to take jurisdiction and decide the issues, even though those decisions result in criticism. The basic strength of the federal judiciary has been, and continues to be, its independence from political and, social pressures.

Frank M. Johnson, Jr., *Judicial Activism is a Duty-Not an Intrusion*, VIEWS FROM THE BENCH: THE JUDICIARY AND CONSTITUTIONAL POLITICS 279,283-4 (1985).

practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S., at 540, 98 S. Ct., at 2497.

II. The Twelfth Congressional District

As noted above, the final decision of the three-judge panel in *Shaw* only approved the 1997 Congressional Redistricting Plan "as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12." *Shaw v. Hunt*, No. 92-202-CIV-5-BR, at 8 (E.D.N.C. Sept. 12, 1997). This panel must thus decide whether the 1997 Plan's Twelfth District violates the equal protection rights of the Plaintiffs who live within the district and challenge its constitutionality.

In holding that District 12 under the 1992 Plan was an unconstitutional racial gerrymander, the Supreme Court in *Shaw II* noted, "[n]o one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race." 517 U.S., at __, 116 S. Ct., at 1906. The *Shaw II* Court thus struck the old District 12 as unconstitutional as a matter of law. In redrawing North Carolina's congressional districts in 1997 the General Assembly was, of course, aware that District 12 under the 1992 Plan had been declared unconstitutional; curing the constitutional deficiencies was one of the legislature's declared goals for the redistricting process. Cooper Aff. ¶¶5, 8, 10, 14.

Defendants now argue that the changes in District 12 between the 1992 and 1997 Plans are dramatic enough to cure it of its constitutional defects. They point to the fact that the new District 12 has lost nearly one-third (31.6 percent) of the population from the 1992 district and nearly three-fifths (58.4 percent) of the land. These numbers neither advance the Defendants' argument nor end the Court's inquiry. As Defendants themselves note, the Court's role is limited to determining "whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights-that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place." *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988) (citing *Upham v. Seamon*, 456 U.S. 37, 42, 102 S. Ct. 1518, 1521, 71 L.Ed2d 725 (1982)). A comparison of the 1992 District 12 and the present District is of limited value here. The issue in this case is whether District 12 in the 1997 Plan violates the equal protection rights of the voters residing within it.

In *Shaw I*, the Supreme Court described the 1992 Plan's District 12 as "unusually shaped ... approximately 160 miles long and, for much of its length, no wider than the [Interstate] 85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods." 509 U.S., at 635-636, 113 S. Ct., at 2820-2821 (internal quotations omitted). The 1997 Plan's District 12 is similar: it is "unusually shaped," it is "snake-like," and it "gobbles in" African-

American population centers. The evidence establishes that although its length has been shortened by approximately 65 miles, it still winds from Charlotte to Greensboro along the Interstate-85 corridor, detouring to envelop heavily African-American portions of cities such as Statesville, Salisbury, and Winston-Salem. It also connects communities not joined in a congressional district, other than in the unconstitutional 1992 Plan, since the whole of Western North Carolina was one district, nearly two hundred years ago.

As discussed above, where cities and counties are split between the Twelfth District and neighboring districts, the splits invariably occur along racial, rather than political, lines-the parts of the divided cities and counties having a higher proportion of African-Americans are always included in the Twelfth. Defendants argue that the Twelfth was drawn not with race, but rather politics and partisanship in mind. They have described the District as a "Democratic island in a Republican sea," and presented expert evidence that political identification was the predominant factor determining the border of District 12. Affidavit of David W. Peterson ("Peterson Aff."). As the uncontroverted evidence demonstrates, however, the legislators excluded many heavily-Democratic precincts from District 12, even when those precincts immediately border the Twelfth and would have established a far more compact district. The only clear thread woven throughout the distracting process is that the border of the Twelfth district meanders to include nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive.

As noted above, objective measures of the compactness of District 12 under the 1997 Plan reveal that it is still the most geographically scattered of North Carolina's congressional districts. When compared to other previously challenged and reconstituted congressional districts in North Carolina, Florida, Georgia, Illinois, and Texas, District 12 does not fare well. The District's dispersion and perimeter compactness indicators (0.109 and 0.041, respectively) are lower than those values for North Carolina's District 1 (0.317 and 0.107 under the 1997 Plan). Similarly, the District suffers in comparison to Florida's District 3 (0.136 and 0.05), Georgia's District 2 (0.541 and 0.411) and District 11 (0.444 and 0.259), Illinois' District 4 (0.193 and 0.026), and Texas' District 18 (0.335 and 0.151), District 29 (0.384 and 0.178), and District 30 (0.383 and 0.180).

Additionally, Plaintiffs' expert, Dr. Weber, showed time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district. (Trial Transcript at 162-3, 204-5, 221, 251, 262, 288.) Of particular note is Dr. Weber's contention that a much more compact, solidly Democratic 12th District could have been created had race not predominated over traditional political considerations in the redistricting process. (Trial Transcript at 220-1) Additionally, Dr. Weber showed that, without fail, Democratic districts adjacent to District 12 yielded their minority areas to that district, retaining white Democratic precincts. (Trial Transcript at 255-6). This testimony served to undermine Defendants' contention that race was merely a factor in creating the 1997 Plan's 12th District, and that a desire to place high-performance

Democratic areas (which happen to contain minority populations) within Democratic districts could explain the construction of the 12th.

The conclusion that race predominated was further bolstered by Senator Cooper's allusion to a need for "racial and partisan balance," cited above. The senator's contention that although he used the term "partisan balance" to refer to the maintenance of a six-six Democrat-Republican split in the congressional delegation, he did not mean the term "racial balance" to refer to the maintenance of a ten-two balance between whites and African-Americans is simply not credible. (Trial Transcript at 429-30)

Dr. Weber, who has testified as an expert in redistricting cases in Louisiana, Texas, Georgia, Virginia and Florida, also presented a convincing critique of the methodology used by Defendants' expert witness, Dr. Peterson. (Trial Transcript at 145) Dr. Weber characterized Dr. Peterson's boundary segment analysis as non-traditional, creating "erroneous" results by "ignoring the core" of each district in question. (Trial Transcript at 222-4) In summary, Dr. Weber found that Dr. Peterson's analysis and report "has not been appropriately done," and was therefore "unreliable" and not relevant. (Trial Transcript at 232)

Finally, the Cooper-Cohen e-mail, discussed above, clearly demonstrates that the chief architects of the 1997 Plan had evolved a methodology for segregating voters by race, and that they had applied this method to the 12th District. The Cooper-Cohen e-mail refers specifically to the categorization of sections of Greensboro as "Black," and a scheme by which this section was added to the 12th District, creating a need to "take about 60,000" other citizens out. (Exhibit 58) It is also relevant as evidence of the means by which the 1997 Plan's racial gerrymandering could be achieved with scientific precision, as the precise racial composition of another district (the First) is discussed at length, along with plans to "improve" that district by "boost[ing] the minority percentage." (Exhibit 58)

The computer system used by the state has the capacity to identify and apportion voters based on race, and to determine the exact racial make-up of each district. The Cohen-Cooper e-mail reveals that exact racial percentages were used when constructing districts.[8] Given that the Supreme Court struck down the 1992 Plan's 12th District, the clear inference here is that a motive existed to compose a new 12th District with just under a majority minority in order for it not to present a prima facie racial gerrymander. In fact, Senator Cooper argued before the legislature that the *Shaw* test for constitutionality would not be triggered because the 12th District was not a majority minority district. (Trial Transcript at 440-1) But using a computer to achieve a district that is just under 50% minority is no less a predominant use of race than using it to achieve a district that is just over 50% minority.

Based on the extensive direct and circumstantial evidence presented at trial, the Court finds as a matter of fact that the General Assembly, in redistricting, used criteria with respect to the Twelfth District that are facially race driven. It is clear that the Twelfth District was drawn to collect precincts with high

racial identification rather than political identification. Additionally, the evidence demonstrates that precincts with higher partisan representation (that is, more heavily Democratic precincts) were bypassed in the drawing of District 12 in favor of precincts with a higher African-American population. The legislature eschewed traditional distracting criteria such as contiguity, geographical integrity, community of interest, and compactness in redrawing the District as part of the 1997 Plan. Instead, the General Assembly utilized race as the predominant factor in drawing the District.[9]

This Court finds that, in contrast to the state's claims regarding the 1st District, no evidence of a compelling state interest in utilizing race to create the new 12th District has been presented. Further, even if such an interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed "strict scrutiny." The 1997 Plan's District 12 is an impermissible and unconstitutional racial gerrymander in violation of the Equal Protection Clause.

To remedy these constitutional deficiencies, the North Carolina legislature must redistrict the 1997 Plan in such a way that it avoids the deprivation of the voters' equal protection rights not to be classified on the basis of race. This mandate of the Court leaves the General Assembly free to use other, proper factors in redistricting the 1997 Plan. The legislature may consider traditional districting criteria, such as incumbency considerations, to the extent consistent with curing the constitutional defects. See *Shaw II.* 517 U.S., at ____, II 6 S. Ct., at 1901 (describing "race-neutral, traditional districting criteria").[10]

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[8] Senator Cooper claimed that the final percentage composition of District 12 was sheer happenstance. (Trial Transcript at 427-8) The explicit discussion of precise percentages in the e-mail belies this characterization.

[9] The Supreme Court has indicated that, when drawing congressional districts, race may not be used as a proxy for political characteristics. *Vera v. Bush*, 517 U.S. 952, ___, 116 S. Ct. 1941, 1956, 135 L.Ed.2d 248 (1996).

III. First Congressional District

The three-judge panel in *Shaw* never ruled on the constitutionality of the 1992 Plan's First Congressional District. Standing problems on the part of the *Shaw* plaintiffs forced that court to narrow its focus to adjudicate only the issues raised regarding the Twelfth District. A comparison of the First and Twelfth Districts under the 1992 Plan reveals, however, that they are similarly egregious in their construction and that the First District would certainly have been subject to the same finding that it was not narrowly tailored. Both were majority-minority districts under the 1992 Plan, and neither evidenced even minimal geographical compactness.

The 1997 Plan's First District, once again presents this Court with a majority-minority district, this time containing a population that is 50.27 percent African-American, as opposed to the Twelfth District's 46.67 percent. The First District is, however, far more compact than the Twelfth and its shape is less irregular, as we have seen above.

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[10] **Our distinguished colleague's dissent treats the standing of Plaintiff Linville at some length Defendants moved to dismiss him from the instant suit, arguing that he did not live within the 1997 Plan's 12th District. This motion was denied at trial. Trial Transcript at 327. As there is standing on behalf of a plaintiff or plaintiffs with respect to each of the challenged districts, Plaintiff Linville's standing is moot as to this Court's ability to reach a decision in the instant case. Thus, we decline to elaborate on the standing issue.**

This Court finds as a matter of fact that, under the 1992 Plan, the First District was not narrowly tailored and therefore that district was in violation of the Constitution. The evidence presented by the Defendants does not dispute this finding.

The statements of several key players in the 1997 redistricting process clearly show that, in an effort to gain pre-clearance under the Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, they allowed race to predominate in the creation of the 1st District. The Cohen-Cooper e-mail is one such clear example, specifically referencing the desire to "boost the minority percentage in the first district" to create an "improved" district. The e-mail exposes a process in which voters were categorized by race, then shifted in and out of the 1st District by a computer program until a precise percentage of minority voters in the district was achieved. No other credible explanation has been offered.

The fact that race predominated in the construction of the 1st District is not surprising. The legislators faced the difficult task of remedying the unconstitutional aspects of the 1992 Plan's 1st District while complying with the mandates of the Voting Rights Act, discussed below. Indeed, Senator Cooper acknowledged that he felt he had to have over 50% minority representation in the First District. (Trial Transcript at 440) This admission reveals that the racial composition of the district was seen as a mandate, a necessity.

Thus, we further find that, in its 1997 Plan, the State continued to use race as the predominant factor in creating the majority-minority First District, and thus strict scrutiny must apply. This does not end our inquiry, however. Defendants may show that the district was narrowly tailored to achieve a compelling government interest.

Section 2 of the Voting Rights Act provides that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State ... in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, ... " 42 U.S.C. § 1973(a) (1988). Congress instructed the courts, when determining whether a voting standard, practice, or procedure violates this prohibition, to examine "the totality of the circumstances" to ascertain whether "the political processes leading to nomination or election" are equally open to citizens of all races. *Id.* § 1973(b). Courts may also consider "[t]he extent to which members of a protected class have been elected to office," but the Act expressly states it does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

In *Thornburg v. Gingles*, the Supreme Court first examined the 1982 amendments to the Act. 478 U.S. 30, 34; 106 S.Ct. 2752, 2758; 92 L.Ed.2d 25 (1986). The Court found that the 1982 amendments no longer required a showing of intentional discrimination in order to prove a violation of the Act. *Id.* at 35, 106 S.Ct. at 2758. The Court identified the following "necessary preconditions" to a § 2 claim:

"First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white

majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed-- usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51, 106 S.Ct. at 2766-67 (footnotes and internal citations omitted). Once these preconditions are met, a court must consider the factors identified in the Senate Report accompanying the 1982 amendments. *Id.* at 48, 106 S.Ct. at 2765.[11]

Defendants presented evidence at trial to show that there was a strong basis for the General Assembly to have believed, at the time of the 1997 Plan's drafting, that the three *Gingles* preconditions and several of the factors set forth in the Senate Report existed in North Carolina. Specifically, the Defendants presented evidence that the African-American population in the area encompassed by District 1 was and is sufficiently large and geographically compact to constitute a majority in a congressional district. Additionally, Defendants contend, and Plaintiffs have stipulated for the purposes of this trial, that the African-American population is politically cohesive. Further, Defendants contend, and Plaintiffs have stipulated for the purposes of this trial, that the white majority votes sufficiently as a block to often enable it to defeat the minority's preferred candidate. Finally, all parties agree that, for many decades, African-Americans in North Carolina were victims of racial discrimination, and that a substantial majority of the State's African-American population is still at a disadvantage in comparison to white citizens with respect to income, housing, education and health.

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[11] Those factors are: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction. Sen.Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07. This list of factors, however, "is neither comprehensive nor exclusive." *Gingles*, 478 U.S. at 45, 106 S.Ct. at 2763.

This Court finds that Defendants have presented sufficient evidence to establish that the State Legislature of North Carolina did have a compelling reason to address race in the construction of the First District under the 1997 Plan. That compelling reason was the need to satisfy Section 2 of the Voting Rights Act in order to ensure that the State's African-American population have equal access to the political process.

Further, this Court finds that the specific composition of the First District's borders, while predominated by race, was narrowly tailored to meet the Section 2 requirements while also addressing other traditional, political considerations, including the desire to protect incumbency, both of a Democrat in the First District and a Republican in the Third District. The splitting of counties and lack of compactness display the interplay between these considerations: the borders were drawn to avoid putting two incumbents in a single district; the State

Legislature intended to exclude as much of the First State Senatorial District from the 1997 Plan's 1st District as possible, resulting in modifications that forced the district's borders south and west. While race predominated, the legislature resisted the temptation to create a district reminiscent of the 1992 Plan's 1st District, which reflected little or no effort to achieve a narrow tailoring.

Thus, this Court finds that the 1997 Plan's 1st District meets the requisite standard of strict scrutiny. Race, while the predominant factor in its composition, was not impermissibly used in establishing its borders. There was a compelling state interest in obtaining pre-clearance under Section 2 of the Voting Rights Act, and the 1st District was narrowly tailored to meet this interest. Thus we find that the 1997 Plan's 1st District does not present an unconstitutional racial gerrymander.

CONCLUSION

For the reasons discussed above, this Court finds that the 1997 Plan's Twelfth District continues to be unconstitutional as presented. Defendants are enjoined from using the unconstitutional District 12 in future elections. The 1997 Plan's First District does not violate the Constitution and may thus be used in future elections. Defendants will have an opportunity to correct the constitutional defects in the 1997 Congressional Redistricting Plan stemming from the 12th District, in default of which the Court must undertake the task.

SO ORDERED.

This 7th day of March, 2000.

TERRENCE W. BOYLE
Chief United States District Judge
RICHARD L. VOORHEES
United States District Judge

By:/S/
TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

OPINIONS OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 14, 1998

[Caption Omitted in Printing]

CONCURRENCE AND DISSENT

THORNBURG, District Judge, sitting by designation as Circuit Judge, concurring in part and dissenting in part:

I join the majority in concluding that the First Congressional district is constitutionally drawn, but respectfully dissent from the reasoning of the majority in reaching that conclusion. I dissent from the majority opinion finding the Twelfth Congressional district to be an unconstitutional racial gerrymander. I also write to address the issue of Ronald Linville's right to remain a party plaintiff in this action.

I. BACKGROUND

In early 1997, the North Carolina General Assembly, for the third time in the decade, undertook the responsibility of redrawing the boundaries of North Carolina's congressional districts.[12] Operating under a court imposed deadline of April 1997 to redraw congressional district boundaries, the politically divided General Assembly faced the task of quickly reaching a consensus on the divisive and inherently political issues involved. In addition to the traditional constituency concerns, the pull of party loyalty, incumbency issues, special interests, and turf protection, the General Assembly was forced to contend with a host of outside forces seeking to influence the process. Looming over the ususal morass of political decision-making was the federal court system, a Justice Department which from past experience was willing to withhold preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and the ever present threat of litigation under Section 2 of the same Act. In addition, able private litigants on both sides of the issue stood ready to sue the State of North Carolina in the event that racial motives controlled the process, or in the event that the process was not racially fair. From this cauldron of conflicting agendas and influences, the majority concludes that *the* predominant motivating factor of the 170 legislators in the General Assembly as they drew the redistricting plans for the First and Twelfth Districts was race. This is a particularly disturbing conclusion under the history, the facts, and the law of this case.

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[12] The General Assembly redrew the districts for the fourth time in 1998 pursuant to this Court's order, and now will be required to do so for the fifth time in early 2000.

That the General Assembly was not completely paralyzed by the demanding task it faced is a testament to the efforts of the legislators themselves, and particularly to the committee chairmen who crafted a plan that would pass both houses. Central to the General Assembly's motivation was the desire not to forfeit the responsibility of drawing constitutional districts to the federal courts, as had happened in Georgia, Texas, and Illinois. To suggest that the General Assembly could navigate these treacherous waters without being aware of the issue of race would be absurd because race loomed as *the*

reason why the General Assembly had to redraw districts in the first place. But, the 1992 Plan is *not* the plan being considered by this Court. The conclusion that racial motivations impermissibly predominated, in a process where consciousness of race is not prohibited,[13] fails to evaluate Plaintiffs' burden of proof and insufficiently credits the plain and direct testimony of the two state legislators who were the driving force behind the 1997 congressional redistricting plan.

II. JUDICIAL DEFERENCE

The Constitution leaves with the States primary responsibility for apportionment of their federal congressional districts. U.S. Constitution, Article I, § 2, as amended by Amendment XIV § 2. "We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier,* 420 U.S. 1, 27 (1975) (citing *Reynolds v. Sims,* 377 U.S. 533, 586 (1964)) (other citations omitted). In the matter of redistricting, courts owe substantial deference to the legislature, which is fulfilling "the most vital of local functions" and is entrusted with the "discretion to exercise the political judgment necessary to balance competing interests." *Miller v. Johnson, 515 U.S. 900, 915 (1995).* The Court must presume the legislature acted in good faith absent a sufficient showing to the contrary. *Id.*

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[13] In dealing with an equal protection lawsuit involving mixed motives in the drawing of congressional districts, "strict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Bush v. Vera,* 517 U.S. 952, 958 (citing *Shaw v. Reno,* 509 U.S. 630, 646 (1993) (Shaw I)).

Consequently, this Court must grant North Carolina's General Assembly substantial deference concerning its decisions related to the 1997 redistricting plan. In deciding this case we should avoid the temptation to legislate for the General Assembly. *Id.* Under the facts of this case and the Supreme Court's decisions, judicial activism is neither necessary nor desirable. The majority would mask its unwarranted intrusion into the North Carolina legislative process by correctly observing the duty of a federal court to "uphold the Constitution and laws of the United States." Majority Opinion, at 18-19, n.7. They ignore, however, Judge Johnson's qualifying words: "[It is] when governmental institutions *fail* to make... judgments and decisions in a manner which comports with the constitution [that] federal courts have a duty to remedy the violation." *Id.* Thus, while espousing judicial restraint, the majority will again declare the Twelfth District unconstitutional and return the distracting plan to the General Assembly for correction. This approach ignores the principles of federalism which require federal courts to exercise deference and restraint in altering the state redistricting decision in the first place.

III. STANDARD OF REVIEW

Strict scrutiny should not be applied to the decision of North Carolina's General Assembly merely because redistricting was performed with consciousness of race. *See* n.1, *supra.* As previously observed, the Voting Rights Act dictates that race may not be ignored. *See eg., Johnson v. Grandy,* 512 U.S. 997 (1994); *Holder v. Hall,* 512 U.S. 874 (1994); *Voinovich v. Quilter,* 507 U.S. 146 (1993). For strict scrutiny to apply, the burden is on the Plaintiffs to show that

"other, legitimate distracting principles were 'subordinated' to race," i.e., that race was *"the predominant* factor motivating the legislature's [redistricting] decision." *Bush,* 517 U.S. at 959 (citing *Miller,* 515 U.S. at 916) (emphasis added). Plaintiffs may meet this burden through either "circumstantial evidence of a district's shape and demographics" or through "more direct evidence going to legislative purpose." *Miller,* 515 U.S. at 916. In *Miller,* the Supreme Court recognized certain factors as legitimate distracting principles, "including, but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests." *Id.* Incumbency protection, at least in the limited form of "avoiding contests between incumbent[s]," has also been recognized as a legitimate state goal. *Bush,* at 964 (citations omitted). Likewise, the Supreme Court has repeatedly held that states "may engage in constitutional political gerrymandering, *even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State is conscious of that fact." Hunt v. Cromartie,* 526 U.S. 541, __, 119 S. Ct. 1545, 1551 (1999) (emphasis added).

> Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

Id. Only where race *predominates* over legitimate districting principles will strict scrutiny apply to a State's redistricting decision.

The burden of proving that racial motives predominated over legitimate districting principles is not easily met. This difficulty is due in part to the inherent nature of any legislative decision where numerous motives and influences are at work. Concurring in the *Miller* decision, Justice O'Connor further clarified the rigorous nature of the Plaintiffs' burden:

> I understand the threshold standard the Court adopts ... to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial disregard* of customary and traditional distracting practices .... [A]pplication of the Court's standard helps achieve *Shaw's* basic objective of making *extreme instances* of gerrymandering subject to meaningful judicial review.

Miller, 515 U.S. at 928-29 (emphasis added). *See also, Quilter v. Voinovich*, 981 F. Supp. 1032, 1044 (N.D. Ohio 1997) ("We therefore follow Justice O'Connor's lead in applying a demanding threshold that allows states some degree of latitude to consider race in drawing districts."), *aff'd*, 523 U.S. 1043 (1998). As a result of this high threshold, a State which does no more than take race into consideration in the redistricting process will not be subjected to strict scrutiny. *Bush*, 517 U.S. at 958. Even a State's decision to intentionally create a minority-majority district will not necessarily be subject to strict scrutiny. *Id.*

In applying this high threshold standard to the case at hand, it is this Court's responsibility to closely examine all of the evidence to determine whether by a preponderance of the evidence the North Carolina General Assembly substantially disregarded legitimate distracting principles, including incumbency protection and political motivations, and subordinated those principles to race in the districting process. Only then can strict scrutiny be applied to the decision of the state legislature. Furthermore, each challenged district must be evaluated separately to determine whether strict scrutiny will apply to that district. In situations where "it is clear that race was not the only factor that motivated the legislature to draw irregular district lines," each challenged district must be scrutinized individually to determine whether the legislature relied on race in substantial disregard of legitimate districting principles. *Bush*, 517 U.S. at 965. The legislature's motivation as to one district cannot be transferred to another.

IV. DISCUSSION

Initially, I note that the 1997 plan must be addressed based on its own merit, not on any resemblance to the 1992 Plan. The majority opinion appears to have recognized this rule of law in noting that the Court's role is limited to determining "whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights-that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place." *McGhee v.*

Granville County, N.C., 860 F.2d 110, 115 (4th Cir. 1988) (citing *Upham v. Seamon*, 456 U.S. 37, 42 (1982)). Nevertheless, the majority makes reference to the "unconstitutional" 1992 Plan in criticizing both the First and Twelfth Districts under the 1997 Plan. This criticism essentially mirrors the "footprint" argument advanced by Plaintiffs, and therefore is equally flawed.

Plaintiffs contend that any district which is based on the "footprint" of a prior unconstitutional district is inherently invalid. This suggests that the legislature *must* begin with a completely clean slate in order to wipe away the vestiges of prior unconstitutional districts. Thus, the North Carolina General Assembly could not use the unconstitutional 1992 Plan as the beginning point for creating the 1997 Plan. However, given that the task of the General Assembly in 1997 was to correct the defects of the 1992 plan, it should be permissible to use the 1992 Plan as the starting point for creating a constitutional plan. Further, it would be illogical to argue that the unconstitutional aspects of a decision made by legislators in 1992 somehow taints the actions of a completely different legislative body in 1997. Most importantly, requiring a legislature to start completely from scratch makes their task nearly impossible because congressional incumbents and state legislators will invariably demand the preservation of as much of the geographic core of districts as possible, a political reality explained in testimony at the trial.[14] Indeed, the undersigned

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[14] Indeed, Senator Roy Cooper, chairman of the Senate (continued...)

can think of no reason why a legislature may not simply address the offensive aspects of an unconstitutional district, cure those defects, and thereby create a constitutional district.

A. The Twelfth Congressional District

To show that racial motives predominated in the drawing of the Twelfth District, Plaintiffs had the burden of proving by a preponderance of the evidence that the legislature substantially disregarded legitimate districting criteria and subordinated those criteria to the improper racial motivation. A thorough treatment of Plaintiffs' burden is noticeably absent from the majority opinion, but this burden must not be overlooked or disregarded. Plaintiffs quite simply have failed to carry their burden through either direct or circumstantial evidence.[15] Defendants, on the other hand, have produced ample and convincing evidence which demonstrates that political concerns such as existing constituents, incumbency, voter performance, commonality of interests, and contiguity, not racial motivations, dominated the process surrounding the creation and adoption of the 1997 redistricting plan.

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[14] (...continued)
Redistricting Committee testified at trial that he did not think the General Assembly *could* have drawn a plan from square one which would have passed because state legislators and congressional incumbents both wanted districts which preserved as much of their geographic cores as possible. Trial Transcript, at 350, lines 12-25. Likewise, Plaintiffs' own expert agreed that legislatures generally try to avoid disrupting the relationship between incumbents and their voters, testifying that "whatever districts [incumbents] end up with, they tend to, in the end, like and wish to preserve as long as they can. That's been an observation over decades and decades of study of redistricting." *Id.*, at 279-80.

[15] Plaintiffs conducted their case as if they were entitled to a presumption that race predominated and merely had to rebut Defendants' efforts to overcome this presumption. However, Plaintiffs are entitled to no such presumption, not by their past success in this area or previous success in this case at the summary judgment stage. The burden of proof lies squarely on the shoulders of Plaintiffs, and they have failed to adequately (continued...)

Finding that race was the predominant motivation and applying strict scrutiny to the Twelfth District fails to evaluate the redistricting process within the context of the legislative environment where such decisions occur.

Passing a redistricting plan in a limited time period, under a federal court order, and in a politically divided General Assembly seemed like an impossible task early in 1997. Trial Transcript, at 475, lines 5-12. In order to succeed, the chairmen of the House and Senate Redistricting Committees recognized the necessity of creating a plan which would garner the support of both parties and both houses. *Id.*, at 335, lines 4-10; at 338, lines 19-22.

Consequently, they set out to design a plan which, in addition to addressing the constitutional deficiencies of past plans, would protect incumbents and thereby maintain the then existing 6-6 partisan split amongst North Carolina's congressional delegation. *Id.*, at 475, lines 13-23; at 338, lines 1-7. Because both the First and Twelfth Districts had Democrat incumbents, and maintaining the 6-6 split was viewed as imperative, preserving a strong Democratic Twelfth

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[15] (...continued)
carry that burden.

District which protected incumbent Mel Watts' political base was absolutely necessary. Affidavit of Roy A. Cooper, III, filed March 2, 1998, at ¶10. In creating such a district, common sense as well as political experience dictated ascertaining the strongest voter performing Democratic precincts in the urban Piedmont Crescent. That many of those strong Democratic performing precincts were majority African-American, and that the General Assembly leaders were aware of that fact, is not a constitutional violation.[16] Those precincts were included in the Twelfth District based primarily upon their Democratic performance, not their racial makeup.[17] North Carolina's legislative leaders have openly admitted to being aware of the race issue, to being conscious of the racial percentages of the districts they drew, and to recognizing that their redistricting plan could potentially be subjected to federal scrutiny yet again as a challenged racial gerrymander.[18] Yet, these were merely some of the numerous political considerations which legislative leaders had to account for in designing a plan which would pass.

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[16] All parties agree that African-American voters in North Carolina are extremely loyal Democratic voters, with over 95% of African-American voters in North Carolina registered and voting accordingly. Trial Transcript, at 388, lines 2-7.

[17] The fact that the majority of African-American legislators in the North Carolina House of Representatives voted *against* the enactment of the 1997 redistricting plan, Trial Transcript, at 478, lines 3-13, tends to undermine the conclusion that the legislature designed districts which impermissibly favored African-Americans.

[18] The majority points to the Cooper-Cohen e-mail as evidence of a "methodology for segregating votes by race." Majority Opinion, at 23. The majority also suggests that sinister inferences arise from Senator Cooper's statements on the legislature floor that the *Shaw* test for constitutionality might not be triggered since the Twelfth District was below

(continued...)

The expert testimony of Dr. David W. Peterson, the unbiased statistician whose opinions were referenced by the Supreme Court in *Hunt v. Cromartie,* supports Defendants' position. Dr. Peterson opined that, based purely on the Plaintiffs' circumstantial statistical evidence, politics was *at least as* plausible a motivating factor as race in the drawing of the Twelfth District. Trial Transcript, at 486-88. In other words, the statistical evidence before the Court does not support the proposition that race *predominated* as a motivation. Yet, it is this same equivocal statistical evidence which forms the backbone of the Plaintiffs' case.

In an attempt to rebut this argument, Plaintiffs relied primarily on the testimony of their expert witness, Dr. Ronald

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[18] (...continued)
50% African-American. However, this anecdotal evidence does little more than reinforce what is already known, and what is not constitutionally impermissible: North Carolina's legislative leaders were conscious of race, aware of racial percentages, on notice of the potential constitutional implications of their actions, and generally very concerned with these and every other political and partisan consideration which affected whether or not the redistricting plan would pass. Although it is indeed helpful and important to examine facts such as these which arguably support Plaintiffs' position, they must be evaluated within the context of Plaintiffs' heavy burden in this case, something the majority fails to do. When viewed in proper context, these evidentiary revelations contribute little to Plaintiffs' efforts to show that racial motives *predominated.* And they certainly do not amount to the "smoking gun" status which Plaintiffs would have the Court believe.

Weber.[19] Dr. Weber also plays a prominent role in the majority opinion. Dr. Weber argued that the North Carolina legislature failed to include numerous precincts in the Twelfth District which had high levels of Democratic support, but which were not majority African-American. Consequently, he contended the legislature must have been more focused on race than on creating a Democratic district. Dr. Weber also criticized Dr. Peterson's findings as "unreliable" and not relevant. Trial Transcript, at 232, lines 1-8. However, it is the testimony of Dr. Weber, who admitted his belief that legislative bodies should not be trusted to draw district lines, which the undersigned finds lacking in credibility. *Id.*, at 281, lines 3-14; *United States v. Turner,* 198 F.3d 425, 429 n.2 (4th Cir. 1999) (citing *Davis V. Alaska,* 415 U.S. 308, 316 (1974) ("The partiality of a witness is always relevant as discrediting the witness and affecting the weight of this testimony.")). This stated bias is evident throughout his testimony and undermines both his criticism of Dr. Peterson as well as his assertion that political explanations fail to explain the composition of the Twelfth District. His "hired gun" mentality and obvious prejudice against legislatures fulfilling "the most vital of local functions," attest to the unreliability of his conclusions.[20] *Miller,* 515 U.S. at 915.

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[19] Plaintiffs also provided the testimony of witnesses who were, at best, peripheral players in the General Assembly's decision-making process. Three of those witnesses were not members of the General Assembly when the plan in question was adopted and indicated no direct involvement with that process. Trial Transcript, at 89, lines 2-7 (R.O. Everette); at 104, 105, lines 1-18 (J.H. Froelich, Jr.); at 113, lines 12-19 (Neil Williams). Of the three witnesses who were members of the General Assembly during the relevant time period, none claimed to have had a significant involvement with or specific knowledge of the decision-making process. Nevertheless, each confidently expressed the opinion that racial motivations did predominate as to the Twelfth District.

Overlooking Dr. Weber's lack of credibility, his arguments still do little to advance Plaintiffs' position. First, there is no dispute that every one of the majority African-American precincts included in the Twelfth District are among the highest, if not the highest, Democratic performing districts in that geographic region. Thus, although Dr. Weber pointed to other precincts which he suggests are highly Democratic in performance, this does not explain why any of the *highest* performing Democratic precincts should be excluded from the Twelfth District. Furthermore, Dr. Weber's entire line of criticism ignored geographic realities and oneperson, one-vote principles. Weber admitted that the precincts which he argued are strongly Democratic were chosen without considering where they were located.[21] Trial Transcript, at 286-88. Further, under one-person, one-vote principles, Weber's precincts could not all possibly be included in the Twelfth

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[20] As the majority notes, Dr. Weber has testified in over 30 racial gerrymandering cases. Exhibit 49. In the dissent in *Johnson v. Mortham,* 926 F. Supp 1460 (N.D. Fla. 1996), Circuit Judge Hatchett criticized Dr. Weber's testimony as lacking credibility because Weber had previously testified in support of the "Margolis plan" in 1992, but now purported to testify against the subsequent plan which he admitted was practically identical. *Id.*, at 1505 n.11, 1513.

[21] On cross-examination, the Defendants presented maps which showed that few highly performing Democratic precincts actually abutted the Twelfth District. Exhibits 140-142; Trial Transcript, at 290-292; at 294, lines 20-25. Consequently, few of the strong Democratic precincts to which Dr. Weber referred could have easily been included in the Twelfth District.

District without removing a corresponding number of voters from elsewhere in the district.[22] *Id.* Finally, Weber's analysis is flawed due to the incorrect assumptions under which he conducted his study. Weber admitted he considered no hypothesis other than race as the legislature's predominant motive, and he specifically failed to inquire about real world political or partisan factors which might have influenced the process. *Id.*, at 258, lines 2-11. One reason for the focus on race was Dr. Weber's incorrect belief that the person drawing North Carolina's districts could only see racial data, when in fact North Carolina's computer screens displayed information on political breakdowns of both voter registration and voter performance.[23] *Id.*, at 261, lines 4-8. This error, his failure to account for other potential factors, the flaws in his arguments, and his ingrained personal bias combine to undermine his subsequent conclusions and criticisms. In the end, the undersigned sees no reason to give any weight to the opinions of Dr. Ronald Weber and fails to understand the majority reliance on such a thin reed.

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[22] The undersigned notes here that just because North Carolina was able to draw a more compact Twelfth District in 1998 which still performed for the Democrats does not mean that the 1997 Twelfth District was necessarily unconstitutional.

[23] Q. Isn't it true that you only considered race because you believed the North Carolina computer system only displayed racial breakdowns and did not display political breakdowns?

> A. At that time I had not seen the screens for North Carolina. I had seen the screens in Louisiana. And in Louisiana, they did not prominently display political information on the screen.

Trial Transcript, at 259, lines 16-23.

Another significant shortcoming of the majority's analysis is the failure to adequately credit the testimony of the two men who were the driving force behind the creation of the 1997 Redistricting Plan. Senator Roy Cooper, III, served as the Democrat chair of the Senate Redistricting Committee and Representative Edward McMahan acted as the Republican chair of the House Redistricting Committee. They were responsible for developing a redistricting plan that could pass both houses and for marshaling it through the legislative process. They indicated that the 1997 plan and the formulation of its boundaries came primarily from their personal negotiations with each other. *Id.*, at 463, lines 3-5. Both testified that correcting the constitutional defects of the previous plan and passage of the bill by ensuring a 6-6 partisan split were the two central goals in developing the 1997 plan. Trial Transcript, at 334; at 475, lines 13-25. Indeed, each testified under oath that politics, not race, was the predominant motivating factor in the Plan's development, with Senator Cooper going so far as to call partisan fairness an "overriding factor." *Id.*, at 337, lines 7-10. This Court's finding that racial motives predominated in the legislative process directly contradicts their express testimony.

In contrast to Plaintiffs, the Defendants adequately supported their position with convincing evidence, even though they had no burden of proof in this trial. Senator Cooper and Representative McMahan detailed the motivations behind their

actions, at times expressing regret for having to expose the naked political nature of their conduct. *Id.*, at 423, lines 4-12. In addition to incumbency protection, other factors considered by the General Assembly included increasing geographic compactness and reducing the number of split counties and precincts. *Id.*, at 349, lines 16-25; at 475, lines 13-25. The 1997 Twelfth District as adopted reflected the legislators' focus on these legitimate districting criteria. The 1997 Twelfth District is more compact, splits fewer counties and precincts, and is much more pleasing to the eye than the previous District. *Id.*, at 334, lines 7-15. The General Assembly shortened the District from 191 to 102 miles, moved 60 percent of the geographic area and 30 percent of the population out of the District,[24] and eliminated the long narrow corridors and other objectionable characteristics which had previously been criticized. *Id.*, at 349, lines 16-23. Most importantly, the Twelfth District is not a minority-majority district by any traditional measurement, numbering 46.67 percent African-American in total population and only 43.36 percent African-American in voting age population. Final Pre-Trial Order, at ¶26.

Furthermore, the General Assembly had before it abundant evidence of a clear community of interest in the Twelfth District.[25] The three urban areas located along the Interstate-85 industrial corridor, known as the Piedmont Crescent, share common characteristics and face similar problems. North Carolina's Section 5 Submission, 1997 Congressional Redistricting Plan, 97C-28F-3B, Tab 10. One statement submitted at a public hearing described the Twelfth District as "uniquely urban in its dominant issues," some of which were described as affordable housing, alternative transportation, air and water quality, and various other complex issues found in an increasingly populated and urban area. *Id.,* at Tab 11, at ¶ 8-9. As a consequence, the urban voters in the Twelfth District as presently configured have much more in common with each other than with rural voters living on the distant outskirts of those urban cities.[26] *Id.* Senator Cooper felt that maintaining this community of interest was one of the legislature's motivating factors, and indeed, the 1997 Twelfth District as drawn reflected and protected the clear community of interest in the Piedmont Crescent. Affidavit of Senator Roy A. Cooper III, at ¶ 9.

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[24] Final Pre-Trial Order, filed November 29, 1999, at ¶'s 36-37. This included moving 4 out of 10 counties into other districts. *Id.*, at ¶30.

[25] Substantial evidence from both private citizens and politicians (continued...)

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[25] (...continued)
concerning the benefits of having a Piedmont Crescent district was submitted at the public hearings and therefore was before the legislature. North Carolina's Section 5 Submission, 1997 Congressional Redistricting Plan, Volume IV.

[26] The majority observes that Charlotte, Winston-Salem, and Greensboro have never before been joined in a congressional district prior to 1992. However, it is irrelevant that the impetus for first grouping these metropolitan areas together was a plan since declared unconstitutional. See discussion, supra p. 6-7. What currently is relevant is the clear community of interest in this Piedmont Crescent district which has been recognized by politicians and private citizens alike.

The evidence presented by Defendants demonstrates that politics predominated in the drawing of the Twelfth District in 1997. Plaintiffs evidence does nothing more than address the admitted fact that legislative leaders were aware of the race issue, or perhaps that the Twelfth District could have possibly been drawn in a different way to accomplish the legislature's stated political goals. Such evidence does not meet Plaintiffs' heavy burden of showing by a preponderance of the evidence that racial motives predominated in substantial disregard of legitimate districting criteria.

> In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines. And the fact that, "[a]s it happens, . . . many of the voters being fought over [by the neighboring Democratic incumbents] were African-American," would not, in and of itself, convert a political gerrymander into a racial gerrymander, no matter how conscious redistricters were of the correlation between race and party affiliation. See *Shaw I,* 509 U.S., at 646, 113 S.Ct., at 2826. If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if

> they merely reflect racial disproportions in the commission of that crime.
>
> If the State's goal is otherwise constitutional political gerrymandering, it is free to use the kind of political data on which Justice Stevens focuses - precinct general election voting patterns, precinct primary voting patterns, and legislators' experience - to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district. To the extent that the District Court suggested to the contrary, it erred.

Bush, 517 U.S. at 967-68 (citations omitted). Only to the extent race is used as a proxy for political characteristics will strict scrutiny be applied to otherwise permissible political gerrymandering. *Id.* Therefore, I conclude that strict scrutiny should not be applied to the Twelfth District.

B. The First Congressional District

The First District in the 1997 Plan is 50.27 percent African-American in total population and 46.54 percent African-American in voting age population. Final Pre-Trial Order, at ¶ 27. Thus, the First District is the only majority-minority district in North Carolina in terms of total population, and no congressional district in this state is majority-minority in terms of voting age population. However, this fact does not change the applicable legal standard. A State's decision to intentionally create a majority-minority district is not

necessarily subject to strict scrutiny. *Bush,* 517 U.S. at 958. Plaintiffs still have the burden of showing by a preponderance of the evidence that race was the predominant factor motivating the legislature's decision and that legitimate districting criteria were subordinated to race. *Miller,* 515 U.S. at 916.

Senator Cooper and Representative McMahan testified that they were motivated to create a majority-minority district in the Northeastern area of the state to avoid concerns under the Voting Rights Act. Trial Transcript, at 365, lines 10-25; at 464, lines 5-8. However, their motivation was predicated on the knowledge that they could create a compact, contiguous district in Northeastern North Carolina which focused on an undeniable community of interests.

> [A]s we went through the process it became clear that we could draw a nice, compact district that made geographic sense, that put together communities of interest, that was a strongly leaning Democratic district, that was slightly majority-minority population.

Id., at 359, lines 18-23.

> District 1 is a largely agrarian rural district. It has a lot of medium sized towns. I think uniquely [in] Eastern North Carolina you have the 30 to 50,000 population towns with largely rural areas. A lot of these counties are largely poorer counties, they are very high up on our economic tiers of depressed

> counties. So I think that there's a great community of interest in Northeastern North Carolina with those counties that are up there.

Id., at 368, lines 8-15.

Likewise, Senator Cooper and Representative McMahan were concerned with creating a geographically compact district. McMahan in particular focused almost exclusively on geographical considerations and "making the district look good." *Id.,* at 467, lines 22-25. And indeed, the 1997 redistricting process resulted in a fairly compact and normal looking congressional district in Northeastern North Carolina. The perimeter and dispersion compactness indicators of the First District are not much lower than the mean compactness indicators for North Carolina's twelve districts.[27] Neither number is low enough to raise a "red flag" according to the criteria set out in the Pildes and Niemi study.[28] Furthermore, as the majority correctly observes, where the borders of the First District have significant irregularities, those irregularities

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[27] The First District has a dispersion compactness indicator of 0.317 and a perimeter compactness indicator of 0.107. Gerald R. Webster, "An Evaluation of North Carolina's 1998 Congressional Districts," Table 3; Defendants' Exhibits 421-22. The mean numbers for North Carolina's twelve congressional districts are .354 and. 192 respectively. *Id.*

[28] That study suggested that a "red flag"should be raised when a perimeter compactness indicator is below .05 and a dispersion compactness indicator is below. 15. Webster, at 13 (citing Pieldes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 Mich.L.Rev. 483, 571573, Table 6 (1993)); Plaintiffs' Exhibit 217.

are attributable to political motivations, namely the desire to protect incumbents and avoid putting two congressional incumbents in a single district. Majority Opinion, at 29. Therefore, although it was the intent of Senator Cooper and Representative McMahan to create a minority-majority district in Northeastern North Carolina, this decision was based on legitimate distracting principles. Quite simply, once they knew they *could* create a compact, contiguous district which addressed the community of interests in Northeastern North Carolina, they felt they *should* do so. Trial Transcript, at 365, lines 17-24.

The majority reaches a different conclusion, however, and applies strict scrutiny to the First District.[29] The majority characterizes the racial composition of the First District as "a mandate, a necessity," and therefore concludes that racial motives predominated. Majority Opinion, at 26. In support of this conclusion, the majority cites the Cooper-Cohen e-mail which refers to the desire to "boost the minority percentage in the first district" to create an "improved" district. Also, the majority points to Senator Cooper's acknowledgment at trial that he felt the need to have over 50 percent minority representation in the First District. Based upon these statements, the majority concludes that the General Assembly "continued to use race as the predominant factor in creating the majority-minority First District, and thus strict scrutiny must apply."[30] *Id.,* at 27.

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[29] After applying a strict scrutiny standard, the majority concludes that the First District is not an unconstitutional racial gerrymander, finding a compelling state interest under § 2 of the Voting Rights Act and narrowly tailored means. Although I strongly feel that the evidence before the Court does not warrant the application of strict scrutiny, I agree with the majority's analysis concerning the application of the *Gingles* factors to the First District.

However, these statements merely highlight the admitted and permissible reality: the North Carolina General Assembly intentionally created a majority-minority district (in terms of population only) in Northeastern North Carolina. But despite the intent to create a majority-minority district, the evidence does not show that racial motives *predominated* in substantial disregard of legitimate criteria like compactness, contiguity, and communities of interest. Trial Transcript, at 365, lines 10-25. On the contrary, the direct testimony shows that the legislature addressed traditional, legitimate districting criteria and determined that a majority-minority district in Northeastern North Carolina was appropriate. Indeed, the criteria of communities of interest and geographical compactness were uppermost in the legislators' minds. Considering the evidence before the Court in light of the deference due the state

legislative decision, my understanding of the applicable legal standard forces me to conclude that race did not impermissibly predominate in the districting process and therefore strict scrutiny should not apply to the First Congressional District.

V. REMEDY

I also respectfully dissent from the decision to require the General Assembly once again to redraw the Twelfth District.

The filing period for Congressional candidates began on January 3, 2000, and ended on February 7, 2000. N.C. Gen. Stat. § 163-106(c). The General Assembly is not scheduled to reconvene until May 2000, the same month that North Carolina will conduct its primary elections. Forcing the General Assembly to call a special session to address this Court's ruling creates a plethora of problems. Ongoing election preparation will be interrupted as congressional candidates will be forced to refile and redesign their election strategies. Citizen confidence in the electoral process will be undermined by the repeated reconfiguration of election districts. While cost is not a factor to be considered in tailoring a constitutional remedy, it will be a concern to citizens hoping for closure in this long-running litigation. Also of no small concern is the time necessary for § 5 pre-clearance of changes from the '97 or '98 plans, the probability of litigation under § 2 of the Voting Rights Act in the event of major changes in district lines, and the virtual certainty of another challenge by Plaintiffs if the new lines do not meet their satisfaction. To suggest that new districts, hastily drawn pursuant to this Court's Order, could have a salutary effect on the 2001 decennial redistricting is purely speculative in view of the major change anticipated in the North Carolina population since 1990. In short, requiring the North Carolina General Assembly to redraw congressional district lines for the year 2000 election, based as they must be on 1990 census figures, is unjustified, unnecessary and, quite probably, an abuse of discretion.

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[30] The majority purports to find that "under the 1992 plan, the First District was not narrowly tailored and therefore that district was in violation of the Constitution." Majority Opinion, at 26. However, this Court has no authority to find that the First District under the 1992 Plan was unconstitutional. Due to a standing issue, the Supreme Court in *Shaw II* did not make a ruling on that district. *Shaw v. Hunt,* 517 U.S. 899, 904 (1996). Neither this Court nor any court has made a legal ruling on the constitutionality of the 1992 First District. *Cromartie v. Hunt,* 4:96-CV-104-BO(3), Order filed June 21, 1998, at 2. The 1992 Plan no longer exists, is not currently being challenged by Plaintiffs in this case, and simply is not an issue before this Court. To the extent the majority's application of the strict scrutiny is predicated on a comparison to the 1992 First District, such reliance is patently wrong. See discussion *supra,* at 6-7.

There is Supreme Court precedent for this Court to consider "the proximity of a forthcoming election and the mechanics and complexities of state election laws" in fashioning appropriate remedies for constitutional violations in redistricting cases. *Reynolds,* 377 U.S. at 585. There is also Supreme Court precedent for allowing an election to proceed under an unconstitutional plan where an election is impending. *Ely v. Klahr,* 403 U.S. 108 (1971).

> [A]s we have often noted, distracting and apportionment are legislative tasks in the first instance, and the court did not err in giving the legislature a reasonable time to act based on the 1970 census figures which the court thought would be available in the summer of 1971.... [T]he District Court should [then] make very sure that the 1972 elections are held under a constitutionally adequate [redistricting] plan.

Id., at 114-15 (footnote omitted).

> [O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be

> the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds, supra; Order, supra, at 14-15 (Ervin, J. dissenting). Further, there is precedent in North Carolina for conducting elections under an unconstitutional plan in order to avoid undue disruption of the electoral process.[31] Permitting the legislature to expend its energy, best judgment, and resources on planning for and developing a constitutional plan for the Twelfth District based on the Year 2000 population data would accord with Supreme Court precedent, accommodate the "equitable considerations" recognized in *Reynolds,* and allow the filings, campaigns and elections for 2000 to proceed on schedule. This Court should keep in mind that whatever the decision is in this case, simple arithmetic and Constitutional mandate dictate the redrawing of at least some new congressional district lines for the year 2002 elections based on the year 2000 census figures.

VI. STANDING

Defendants contest Plaintiff Ronald Linville's standing to participate in this case. As Plaintiffs stipulate, Linville is not a current resident of the First or Twelfth Congressional Districts, the two districts being challenged as racial gerrymanders.[32] Final Pre-Trial Order, filed November 29 1999, at ¶s 20-23. Although he does not claim to be unhappy with his own district, Linville gives numerous objections to the Twelfth District and concludes that it is drawn along racial lines. Linville Draft Deposition, at 17, 20, 23, 25-26, 34, 56, 57, 65, 75-77. Linville further complains about being separated from his father politically, being implicitly told he was "too white to belong in the district right next to [him]," and being "deliberately segregated immediately outside of a racially drawn district whose boundary was adjacent to his own precinct." Plaintiffs' Response to Defendants' Motion for Summary Judgment, at 22, n.11. Plaintiffs produced no further evidence which suggests that Linville has been personally injured by a racial classification, despite assurances at the beginning of the trial that they would do so. Trial Transcript, at 5, lines 10-12.

Federal courts have an independent obligation to examine their own jurisdiction; standing "is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays,* 515 U.S. 737, 742 (1995) (quoting *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 230-31 (1990)). The party who seeks the exercise of jurisdiction has the burden of clearly alleging facts which demonstrate that he or she is a proper party to invoke judicial resolution of the dispute. *Hays,* 515 U.S. at 743. Even where a case has proceeded to final judgment after a trial, "those facts

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[31] In *Shaw v. Hunt,* 517 U.S. 899 (1996) *(Shaw II),* the Supreme Court found that the Twelfth District, as drawn under the 1992 redistricting plan, was unconstitutional. On remand, the three-judge panel determined that the 1996 general elections would continue under the unconstitutional plan.

> [I]n exercise of this Court's equitable power to withhold the grant of immediately effective relief for found constitutional violations in legislative districting plans in order to avoid undue disruption of ongoing state electoral processes, the 1996 primary elections already held for congressional offices are hereby validated and the 1996 general election for those offices may proceed as scheduled under state law to elect members of congress under the existing districting plan.

Order, filed July 30, 1996 in *Shaw v. Hunt,* 92-202-CIV-5-BR at 2-3 (citing *Reynolds,* 377 U.S. at 585).

[32] Although Linville was a resident of the Twelfth District under the 1992 Plan, under the 1997 Plan he is a resident and registered voter of the adjoining Fifth District. His precinct is 95.94 percent white. *Id.*

(if controverted) must be 'supported adequately by the evidence adduced at trial' to avoid dismissal on standing grounds." *Id.* (citations omitted).

In the context of redistricting cases, a citizen has standing to challenge a racial classification in federal court if that citizen is "able to demonstrate that he or she, *personally*, has been injured by that kind of racial classification." *Id.*, at 744. Because of the difficulty in demonstrating this individualized harm, the Supreme Court created a presumption in favor of standing for *residents* of a challenged district. *Hays,* 515 U.S. at 744-45; accord *Miller v. Johnson,* 515 U.S. 900, 910-11 (1995). However, where a plaintiff is not a resident of the challenged district, the plaintiff is not afforded the benefit of this presumption.

> [W]here a plaintiff does not live in such a district, he or she does not suffer those special harms, and *any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent* ***specific evidence*** *tending to support that inference.* Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.

Hays, 515 U.S. at 745 (emphasis added). The Supreme Court repeatedly has refused to recognize a "generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Id.*, at 743

(citations omitted). Consequently, plaintiffs who are not residents of a challenged district may sue only if they are able to make a specific evidentiary showing that they have been "personally classified by race." *Id.*, at 745; *Shaw II,* 517 U.S. at 904; *Bush,* 517 U.S. at 957-58.

By seeking to include Linville as a participant in this lawsuit, Plaintiffs ask this Court to grant standing to a class of plaintiffs which the Supreme Court has explicitly refused to recognize. Only where a non-resident plaintiff is able to make a specific evidentiary showing of personal injury will that plaintiff have standing to sue in federal court. Linville's litany of generalized grievances will not suffice to create standing. Because Linville is not a resident of the First or Twelfth Districts, and *no* specific evidence that he has personally been subjected to a racial classification is before this Court, I would dismiss Linville as a plaintiff for lack of standing.

VII. CONCLUSION

Lost amidst the smoking gun e-mails, the "uncontroverted" statistical information, and the indignant examinations of irregular district lines is Plaintiffs' burden of proof in this case. The Plaintiffs must demonstrate by a preponderance of the evidence that a racial motivation predominated in the legislature's decision-making and that legitimate districting principles were subordinated to those racial motivations. The Supreme Court's remand in this case affords no relief from the responsibility of meeting this burden. Merely showing that race was an issue, that it was always considered, or that it had an influence on the ultimate outcome is not sufficient.

The two men most knowledgeable about the 1997 Congressional redistricting plan testified before this Court that political, not racial, motivations were the predominant factor in the General Assembly's decision-making process. Their direct testimony, even when confronted with the evidence relied on by the majority, proves that racial motivations did not predominate. Therefore, strict scrutiny should not be applied to the General Assembly's 1997 decision.

Finally, I am compelled to note that this decision forces the North Carolina General Assembly to create a redistricting plan based on population figures from the 1990 census, numbers which everyone admits are outdated. This new plan will last only one year and will then be replaced by a plan based on the 2000 census figures. When previously forced by this Court to redraw the Twelfth District in 1998, the General Assembly created a plan which garnered the approval of this Court and was pre-cleared by the Justice Department. Indeed, North Carolina's current Congressional delegation was elected under that plan in the 1998 general elections. Were the General Assembly to simply readopt the 1998 plan, the additional expenditure of legislative time, effort, and resources might be minimized. Otherwise, for the fifth time in 10 years, North Carolina's legislature must undergo the arduous task of reaching a consensus on the divisive and inherently political issue of congressional redistricting.

NOTICE OF APPEAL, MARCH 10, 2000

[Caption Omitted in Printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that all defendants appeal to the Supreme Court of the United States from the March 7, 2000 Opinion, order, and injunction and the oral denial at trial of defendants' motion for summary judgment on the grounds of claim preclusion and virtual representation by the three-judge district court.

This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted, this the 10th day of March, 2000.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/S/ Edwin M. Speas, Jr.
Chief Deputy Attorney General
N.C. State Bar No. 4112

/S/Tiare B. Smiley
Special Deputy Attorney General
N. C. State Bar No. 7119

/S/ Norma S. Harrell
Special Deputy Attorney General
N.C. State Bar No. 6654
N.C. Department of Justice
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Raleigh, N.C. 27602
(919) 716-6900

[Certificate of Service Omitted in Printing]

JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, MARCH 8, 2000

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JUDGMENT

Decision by Three-Judge Court. This Action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that this court finds that the 1997 Plan's Twelfth District continues to be unconstitutional as presented. Defendants are enjoined from using the unconstitutional District 12 in future elections. The 1997 Plan's First District does not violate the Constitution and may thus be used in future elections.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, as stated in open court, movant Norman Primus' motion to appear as Amicus Curiae is DENIED.

This Judgment Filed and Entered on March 8, 2000, and Copies To:

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March 8, 2000

DAVID W. DANIEL, CLERK
/s/ Jolie Skinner
(By) Deputy Clerk

U.S. Const. amend. XIV, § 1

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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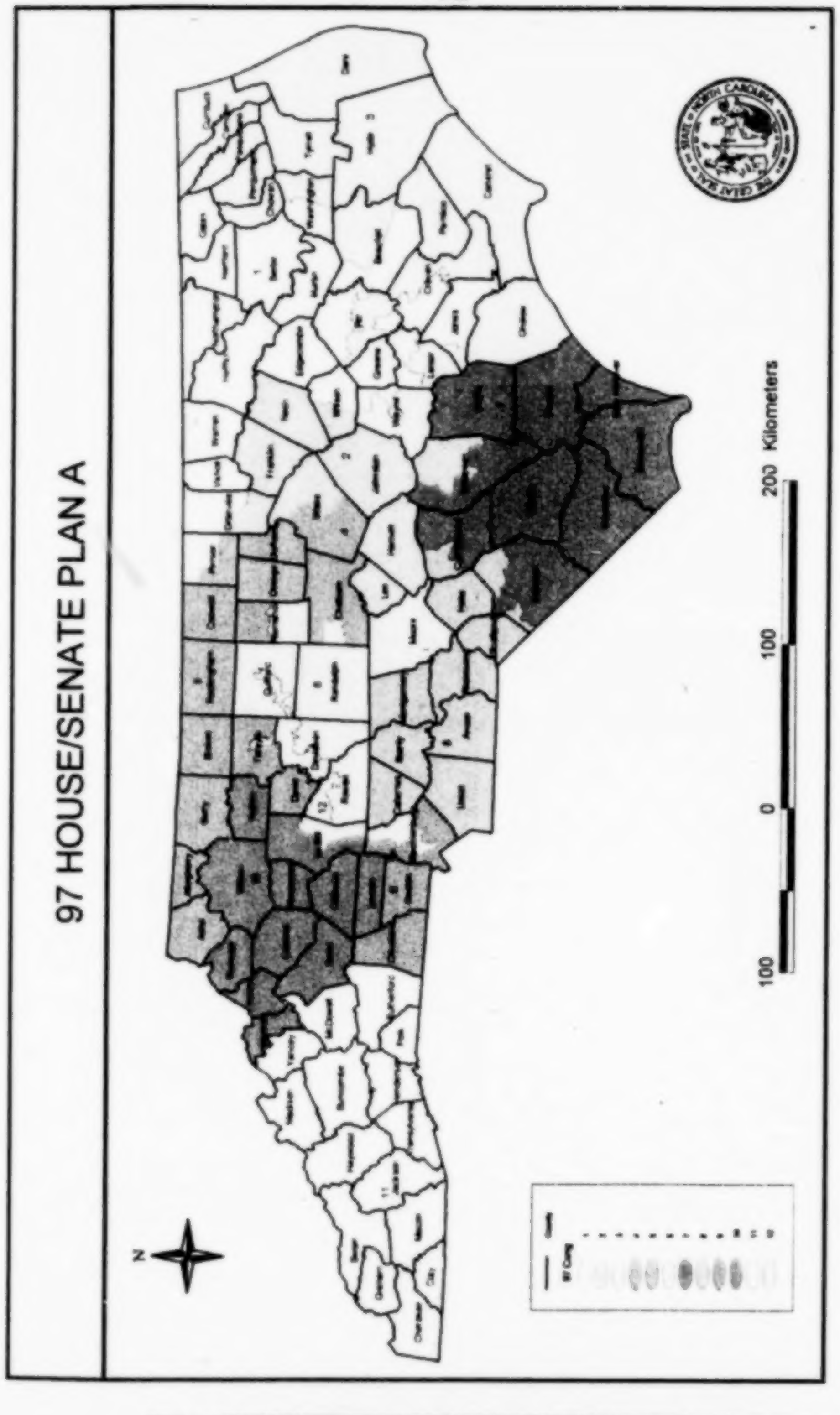
97 HOUSE/SENATE PLAN A
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EXCERPTS FROM DISTRICT SUMMARIES FOR 1997 HOUSE/SENATE PLAN A

TOTAL POPULATIONS, ALL AGES

Dist	Pop	White	Black	Am Ind	Asian/PI	Other
1	552,161	268,458	277,565	3,461	1,238	1,440
	100%	48.62%	50.27%	0.63%	0.22%	0.26%
2	552,152	388,234	154,108	2,267	4,183	3,363
	100%	70.31%	27.91%	0.41%	0.76%	0.61%
3	552,622	429,481	109,358	2,131	5,625	6,027
	100%	77.72%	19.79%	0.39%	1.02%	1.09%
4	551,842	421,224	116,006	1,454	10,770	2,391
	100%	76.33%	21.02%	0.26%	1.95%	0.43%
5	552,084	471,868	75,177	1,045	2,381	1,613
	100%	85.47%	13.62%	0.19%	0.43%	0.29%
6	552,171	493,140	52,248	2,039	3,279	1,463
	100%	89.31%	9.46%	0.37%	0.59%	0.26%
7	552,382	371,545	133,985	40,845	2,791	3,216
	100%	67.26%	24.26%	7.39%	0.51%	0.58%
8	553,143	373,569	153,396	14,294	5,541	6,343
	100%	67.54%	27.73%	2.58%	1.00%	1.15%
9	552,615	481,834	61,443	1,517	6,408	1,413
	100%	87.19%	11.12%	0.27%	1.16%	0.26%
10	553,333	512,213	36,123	933	2,482	1,583
	100%	92.57%	6.53%	0.17%	0.45%	0.29%
11	552,089	512,127	29,276	7,888	1,838	960
	100%	92.76%	5.30%	1.43%	0.33%	0.17%
12	552,043	284,799	257,644	2,282	5,630	1,689
	100%	51.59%	46.67%	0.41%	1.02%	0.31%

EXCERPTS FROM DISTRICT SUMMARIES FOR 1997 HOUSE/SENATE PLAN A

Voting Age Populations

Dist	Pop	White	Black	Am Ind	Asian/PI	Other
1	403,065 100%	211,273 52.42%	187,573 46.54%	2,450 0.61%	872 0.22%	955 0.24%
2	419,099 100%	303,740 72.47%	108,234 25.83%	1,649 0.39%	3,169 0.76%	2,307 0.55%
3	417,769 100%	330,971 79.22%	76,672 18.35%	1,657 0.40%	4,012 0.96%	4,457 1.07%
4	427,266 100%	332,013 77.71%	84,535 19.79%	1,118 0.26%	7,927 1.86%	1,673 0.39%
5	428,181 100%	370,222 86.46%	54,468 12.72%	774 0.18%	1,679 0.39%	1,039 0.24%
6	426,321 100%	384,226 90.13%	37,317 8.75%	1,472 0.35%	2,263 0.53%	1,044 0.24%
7	408,299 100%	287,254 70.35%	90,009 22.04%	26,816 6.57%	2,067 0.51%	2,153 0.53%
8	402,666 100%	283,487 70.40%	101,961 25.32%	9,096 2.26%	3,909 0.97%	4,213 1.05%
9	419,559 100%	371,456 88.53%	41,670 9.93%	1,110 0.26%	4,358 1.04%	966 0.23%
10	425,367 100%	396,936 93.32%	25,136 5.91%	696 0.16%	1,499 0.35%	1,102 0.26%
11	430,111 100%	402,639 93.61%	20,455 4.76%	5,159 1.20%	1,257 0.29%	601 0.14%
12	414,784 100%	228,346 55.05%	179,846 43.36%	1,671 0.40%	3,812 0.92%	1,109 0.27%

EXCERPTS FROM DISTRICT SUMMARIES FOR 1997 HOUSE/SENATE PLAN A

Registration

Dist	Pop	White	Black	Other	Dem	Repub
1	271,673 100%	148,208 54.55%	121,958 44.89%	1,491 0.55%	235,336 86.62%	31,393 11.56%
2	262,713 100%	197,138 75.04%	64,603 24.59%	972 0.37%	188,416 71.72%	63,567 24.20%
3	213,448 100%	177,975 83.38%	34,801 16.30%	688 0.32%	148,801 69.71%	54,152 25.37%
4	315,782 100%	255,728 80.98%	55,959 17.72%	4,095 1.30%	200,635 63.54%	86,394 27.36%
5	295,332 100%	261,355 88.50%	33,380 11.30%	597 0.20%	172,461 58.40%	105,168 35.61%
6	290,562 100%	266,904 91.86%	22,935 7.89%	726 0.25%	143,304 49.32%	127,298 43.81%
7	273,584 100%	193,592 70.76%	61,670 22.54%	18,322 6.70%	200,676 73.35%	63,969 23.38%
8	233,898 100%	170,879 73.06%	58,907 25.18%	4,112 1.76%	160,694 68.70%	61,417 26.26%
9	295,719 100%	267,583 90.49%	27,125 9.17%	1,011 0.34%	153,291 51.84%	120,359 40.70%
10	300,037 100%	283,994 94.65%	15,676 5.22%	365 0.12%	139,665 46.55%	140,415 46.80%
11	319,610 100%	304,158 95.17%	13,108 4.10%	2,344 0.73%	188,349 58.93%	111,979 35.04%
12	277,525 100%	150,264 54.14%	126,488 45.58%	773 0.28%	197,783 71.27%	65,708 23.68%

EXCERPTS FROM DISTRICT SUMMARIES FOR 1997 HOUSE/SENATE PLAN A

ELECTIONS

Dist	Senate Gantt	Senate Helms	Lt. Gov. Rand	Lt. Gov. Gardner	Court Lewis	Court Smith
1	84,590 53.28%	74,188 46.72%	97,349 61.83%	60,092 38.17%	101,516 69.66%	44,207 30.34%
2	77,449 47.00%	87,350 53.00%	82,802 51.02%	79,483 48.98%	80,919 54.34%	67,993 45.66%
3	53,362 41.53%	75,119 58.47%	62,499 46.85%	70,906 53.15%	65,828 53.48%	57,263 46.52%
4	116,953 58.79	81,994 41.21%	104,429 53.36%	91,266 46.64%	91,593 52.33%	83,439 47.67%
5	71,185 39.17%	110,556 60.83%	88,395 45.71%	104,989 54.29%	82,168 46.53%	94,441 53.47%
6	65,644 37.47%	109,545 62.53%	73,141 41.17%	104,528 58.83%	63,286 37.99%	103,287 62.01%
7	75,154 48.26%	80,562 51.74%	91,897 57.23%	68,676 42.77%	87,320 58.70%	61,441 41.30%
8	64,574 47.40%	71,664 52.60%	76,221 55.44%	61,265 44.56%	69,792 55.29%	56,442 44.71%
9	79,462 44.75%	98,104 55.25%	72,891 40.95%	105,102 59.05%	60,368 38.22%	97,577 61.78%
10	69,023 37.37%	115,669 62.63%	77,694 40.03%	116,377 59.97%	73,264 39.30%	113,144 60.70%
11	86,212 45.93%	101,511 54.07%	94,396 47.13%	105,889 52.87%	91,924 48.91%	96,040 51.09%
12	107,333 66.49%	54,101 33.51%	93,441 62.08%	57,084 37.92%	85,103 61.54%	53,177 38.46%

AFFIDAVIT OF ROY A. COOPER, III, WITH ATTACHED MAP (WITHOUT RESUME)

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AFFIDAVIT OF ROY A. COOPER, III

Roy A. Cooper, III, being first duly sworn deposes and says:

1. I am a native of Nash County, North Carolina. After receiving my undergraduate and law degrees from the University of North Carolina at Chapel Hill, I returned home to Nash County where I have practiced law since 1982. A copy of my resume is attached to this affidavit.

2. In 1986, 1988 and 1990, I was elected to the North Carolina House of Representatives and in 1992, 1994 and 1996, I was elected to the North Carolina Senate. During the 1996 Session of the General Assembly, I served as Chairman of the Senate Judiciary Committee and the Senate Select Committee on Congressional Redistricting. I had not previously served on any redistricting committee.

3. My responsibility as Chairman of the Senate Redistricting Committee was to attempt to develop a new congressional plan that would cure the constitutional defects in the prior plan, and that would have the support of a majority of the members of the Senate, which was controlled by the Democrats, and the support of a majority of the members of the House, which was controlled by the Republicans. Under an order entered by the three-judge court in *Shaw v. Hunt,* the new plan had to be completed by March 31, 1997, to avoid the federal court imposing a plan on the State. The Senate's efforts to meet this responsibility are recorded in the transcripts of the meetings of the Senate Committee and of the debates on the floor of the Senate. A true and accurate copy of these transcripts is included in the North Carolina Section 5

Submission, 1997 Congressional Redistricting Plan (filed with the Affidavit of Gary O. Bartlett) as Attachments 97C-28F-4D(1)-(4).

4. Representative W. Edwin McMahan was appointed Chairman of the House Redistricting Committee by Speaker Brubaker. His responsibilities were essentially identical to mine.

5. Many people doubted that the General Assembly would be able to achieve a compromise between the Democratic controlled Senate and Republican controlled House. Redistricting generally is a task which becomes extremely partisan. Working with the leadership of the Senate and the House, however, Representative McMahan and I early on identified a single path by which a compromise might be reached and a new plan adopted. This path was to craft a plan which would cure the defects in the old plan and at the same time preserve the existing partisan balance in the State's congressional delegation. The Senate Redistricting Committee made the first attempt to travel down this path.

6. On February 20, 1997, after consultation with other Senate members, I presented a proposed plan, entitled Congressional Plan A (hereinafter Plan A), to the Senate Redistricting Committee. This plan was similar to alternative plans later proposed by the House Redistricting Committee and Representative McMahan and to the plan ultimately enacted by the General Assembly. Because Plan A turned out to be the prototype for the enacted plan, I will describe the goals the Senate leadership and I wanted to achieve in designing this plan. In addition, I will describe the process used to draw the districts in Plan A to achieve those goals. Particular attention will be given to Districts 1 and 12.

7. We had two goals for the plan as a whole. The first goal was to cure the constitutional defects in the prior plan by assuring that race was not the predominate factor in constructing any district in the plan and to assure that traditional redistricting criteria were not subordinated to race. To accomplish this first goal, emphasis was placed on the following factors in constructing the plan: (1) avoidance of division of precincts; (2) avoidance of the division of counties when reasonably possible; (3) functional compactness (grouping together citizens of like interests and needs); (4) avoidance of long narrow corridors connecting concentrations of minority citizens; and (5) ease of communication among voters and their representatives. A comparison of the unconstitutional 1992 plan and Plan A demonstrates that this goal was accomplished. For example: (1) the unconstitutional plan divided 80 precincts while Plan A divided only 2 precincts (both of which were divided only to accommodate peculiar local circumstances); (2) the unconstitutional plan divided 44 counties while Plan A divided only 22; (3) the unconstitutional plan divided 7 counties among 3 districts while Plan A did not divide any county among 3 districts; (4) the unconstitutional plan used "cross-overs," "double cross-overs" and "points of contiguity" to create contiguous districts while Plan A used none of these devices.

8. Our second goal, and the goal that made it possible for the General Assembly to agree upon and enact a new plan, was to maintain the existing partisan balance in the State's congressional delegation, 6 Republicans and 6 Democrats. Based on my discussions with Senate leaders and with Representative McMahan, I knew that any plan which gave an advantage to Democrats faced certain defeat in the House while any plan which gave an advantage to Republicans faced certain defeat in the Senate. Preserving the existing partisan balance, therefore, was the only means by which the General Assembly could enact a plan as required by the Court. To achieve this pivotal goal, we designed Plan A to preserve the partisan core of the existing districts to the extent

reasonably possible and to avoid pitting incumbents against each other. One tool I used to measure the partisan nature of districts was election results gathered and analyzed by the National Committee for an Effective Congress (NCEC). The NCEC information was based on the results of a series of elections from 1990 to 1996. I also used older election results contained in the legislative computer data base. In the end, these election results were the principal factor which determined the location and configuration of all districts in Plan A so that a partisan balance which could pass the General Assembly could be achieved.

9. The two goals we applied in drawing the plan as a whole were also applied in drawing Districts 1 and 12. To assure that race did not predominate over traditional redistricting criteria, District 12 was drawn so that (1) only 1 precinct was divided (a precinct in Mecklenburg County that was divided in every local districting plan); (2) its length was reduced by 46% (from approximately 191 miles to 102 miles) so that it became the third shortest district in the state; (3) the number of counties included in the district was reduced from 10 to 6; (4) all "cross-overs," "double cross-overs" and "points of contiguity" were eliminated; and (5) it was a functionally compact, highly urban district joining together citizens in Charlotte and the cities of the Piedmont Urban Triad. To assure that race did not predominate over traditional redistricting criteria, District 1 was drawn so that (1) no precincts were split; (2) the number of counties included in the district was reduced from 28 to 20; (3) the number of divided counties included in the district was reduced from 18 to 10; (4) all "cross-overs," "double cross-overs" and "points of contiguity" were eliminated; (5) the length of the district was reduced by 24% (from approximately 225 miles to 171 miles); and (6) it was a functionally compact district joining together citizens in most of the rural and economically depressed

counties in the northern and central Coastal Plain region of the State.

10. Maintaining Districts 1 and 12 as Democratic leaning districts was critical to achieving the pivotal goal of protecting the partisan balance in the State's congressional plan. Achieving this goal for Districts 1 and 12, however, presented special problems. First, the House insisted that District 1 had to be drawn in a manner that protected Congressman Jones in District 3 and that avoided placing Congressman Jones' residence inside the boundaries of District 1. Second, District 12 had to be drawn in a manner that avoided placing Congressman Burr's and Coble's residences inside the boundaries of District 12. Third, District 12 had to be drawn in a manner that would not include Cabarrus County, Congressman Hefner's home county. Fourth, significant portions of Congressman Watt's and Congresswoman Clayton's former districts had been eliminated because of the directive in *Shaw v. Hunt*, thus lessening their strength as incumbents. Finally, we were concerned that Congressman Watt might lose some votes because of his race and that Congresswoman Clayton almost certainly would lose votes because of her race. To help protect District 1 as a Democratic leaning district, we included the heavy concentrations of Democratic voters in the cities of Rocky Mount, Greenville, Goldsboro, Wilson and Kinston, and to help protect District 12 as a Democratic leaning district, we included the heavy concentrations of Democratic voters in Charlotte, Greensboro and Winston-Salem in the district.

11. In developing Congressional Plan A, I also became convinced from expert studies before the General Assembly and my own knowledge and experience that Section 2 of the Voting Rights Act likely required the creation of a majority-minority district in the central to northern part of the Coastal Plain, where the largest concentration of black citizens

reside. *See* the attached map entitled, North Carolina Counties by Percent of Population Black, which illustrates the correlation between the boundaries of District 1 and this concentration of black citizens. That belief was balanced with my primary goals of curing the defects in our prior plan and protecting the existing partisan balance in the Congressional delegation in locating and drawing District 1 in Congressional Plan A.

12. On February 20, 1997, I presented Congressional Plan A to the Senate Redistricting Committee and on February 25, 1997, Representative McMahan presented his first plan, Congressional Plan A.1, to the House Redistricting Committee. Congressional Plan A and A.1 were similar. Based on NCEC election results, however, I was concerned that Representative McMahan's plan unnecessarily diminished Democratic performance in Districts 2, 8 and 12, Congressmen Hefner's, Etheridge's and Watt's districts.

13. Over the next several weeks, Representative McMahan and I were able to resolve my concerns and the concerns of the Senate leadership by negotiation. The compromise we reached finally was reflected in a plan entitled "97 House/Senate Plan." This is the plan that was enacted by the General Assembly on March 31, 1997. The first plan, "Congressional Plan A," and "97 House/Senate Plan," the enacted plan, are very similar. One of the differences is that the first plan had 24 divided counties while the enacted plan reduced the number of divided counties to 22.

14. The "97 House/Senate Plan" is a negotiated bipartisan plan which contains districts located and shaped in a manner to avoid constitutional problems and to protect the existing partisan balance in the State's Congressional delegation. Racial fairness was, of course, considered in the development of the plan. Our obligations to represent all of our constituents of all races and to comply with the Voting Rights Act demanded that racial fairness be considered. The plan enacted is racially fair, but race for the sake of race was not the dominate or controlling factor in the development or enactment of the plan. In drawing initially Congressional Plan A and in negotiating the eventually enacted plan, partisan election data, not race, was the predominant basis for assigning precincts to districts including precincts in Districts 1 and 12. That a large proportion of precincts assigned to District 12 have significant black populations is simply the result of a strong Democratic voting pattern among blacks. Moreover, District 12 is not even composed of a majority of black citizens; it is a district in which white citizens constitute 52% of the district's total population, 55% of the districts' voting age population and 54% of the districts' registered voters. Simply, District 12 is a Democratic island in a largely Republican sea.

This the 25th day of Febru , 1998.

/s/ Roy A. Cooper, III

Sworn to and subscribed before me this
25th day of February, 1998.

/s/ Beverly Adams
Notary Public

My commission expires: 1/24/2000

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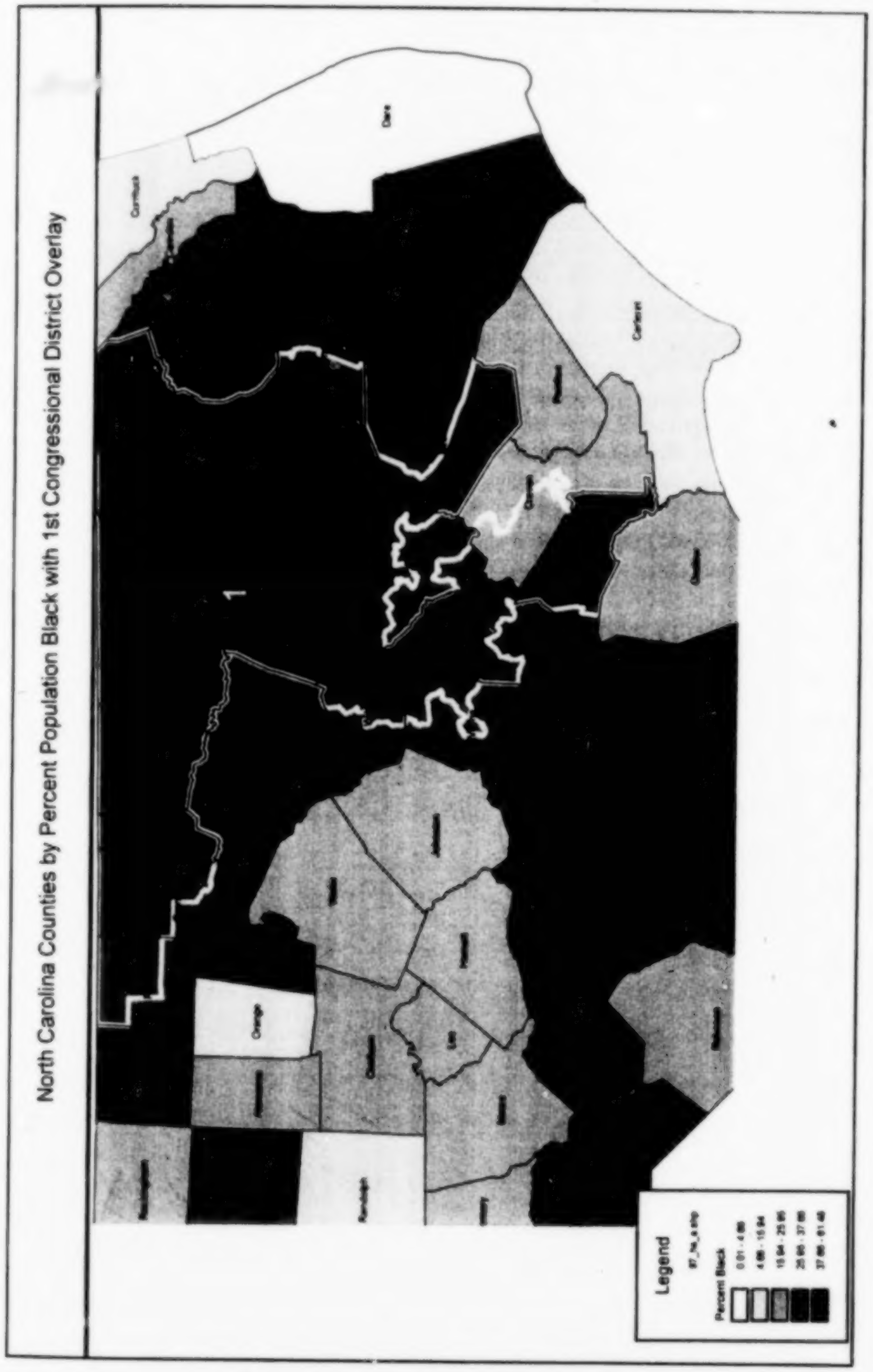

North Carolina Counties by Percent Population Black with 1st Congressional District Overlay

Dare
Currituck
Carteret
Orange
Lee
Randolph
1
Legend
Percent Black

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ROY A. COOPER, III, TRIAL TESTIMONY (SELECTED PORTIONS)

[*334] A. Well, I read the opinion in *Shaw versus Hunt*, and the first thing that we needed to do was to cure the constitutional defects in the 1992 Plan. So that was the first consideration. And I think in general that meant making the plan look a lot nicer; and secondly, to make certain that race was not the predominate factor in drawing the districts. And in making the districts look a lot nicer, we needed to make sure we didn't split precincts, try to split fewer counties, make sure you didn't have one county with three members of congress. Making sure you didn't have long narrow corridors where you didn't have any people. Making sure you didn't have the double-cross overs and cross overs and point contiguity and all of these concerns that were pointed out by the court.

Q. Before you go onto the second goal, was there any feeling on your part or the leadership of the Senate not to create and draw a constitutional plan?

A. No. We wanted to make sure that the plan was constitutional.

Q. Would you prefer not to be back in court again?

A. Most definitely.

Q. What was the other one?

A. The other concern was we wanted to make sure that the legislature drew this plan and not the federal courts.

[*335] Q. With all due respect to the federal courts?

A. With all due respect to the federal courts, yes.

Q. But?

A. But we felt it was our responsibility and we didn't want to delegate that authority. We knew we had a real problem with that and the Senate was majority Democratic and the House majority Republican and we knew if we had a plan that was too partisan one way or the other that you would never get enough votes in the chamber that was getting the short end of the stick.

Q. If I might interrupt you for a moment. In 1996, what occurred with respect to the incumbents, the congressional delegation for North Carolina?

A. With the 1996 election, there were we ended -- up with a delegation of six Democrats and six Republicans after the election.

Q. I'm sorry to interrupt you.

A. We knew that would be important because the bottom line was to make sure we had 26 votes in the Senate and 61 votes in the House to pass the plan and there are many considerations that you have to take under consideration when you try to do that.

Q. And in terms of gaining votes, do you look after the interest of incumbents?

A. That was a consideration and the reason it's a **[*336]** consideration is that incumbents are in office, they have a constituency. They have people who advocate for them in the General Assembly. Oftentimes they have close relations with legislators, and so incumbents can affect votes in the General Assembly.

And although it would be nice to draw these districts in a vaccuum and to make them look nice and to completely ignore partisan politics and completely ignore who's the incumbent, I'd like to find a way to do that. But in order to get votes in the General Assembly, to get a plan passed, you can't do that and you have to take into consideration what incumbents think about the plan.

Judge Boyle: Let me interrupt for a second. Don't lose your train of thought. As a benchmark, the congressional delegation is now seven, five Republican in the '98 election. In the 1996 election, it was 6/6, even. In the '94 election, it was 8/4 Republican. And in the '92 election, it was 4/8, Republican, Democrat; is that correct?

Ms. Smiley: That's how I recall. Perhaps Senator you may know.

The Witness: That's right.

Judge Boyle: So since redistricting in '91, 2 with the '92 Plan, North Carolina has gone 8/4 Democrat, 8/4 Republican, 6/6 and now 7/5 in the four succeeding **[*337]** congressional elections.

The Witness: Yes, sir.

Judge Boyle: All right.

The Witness: And that's one reason you never can predict. I mean, that's ultimately these elections are up to the people and it's very difficult to predict, although we did spend quite a bit of time looking at election results because we knew that the partisan fairness of the plan would be an overriding factor in trying to get a plan with a majority of votes in both chambers. So we had to pay attention to that, although you can never predict exactly.

By Ms. Smiley:

Q. Well, looking at the partisan balance over this decade that Judge Boyle has just refreshed our recollection with, was 1996, was that a windows opportunity when you did have the redistricting at that time there was a balance?

A. I'm not sure that we could have gotten a plan through the General Assembly had there not been a 6/6 split because eventually we settled on that as a fair proposition. It was a fair proposition to the public. It was fair to the legislators. I think you have a lot of Democrats in the Senate who would have wanted to draw the plan to favor Democrats and Republicans in the House.

[*338] One wanted to draw the plan to favor Republicans and this situation that we had already with the 6/6 split made it a very convenient way to have a plan that was fair in a partisan manner. So Representative McMahan and I decided early on and the leadership of both the House and Senate decided early on we needed to strive toward a plan that was a fair 6/6 partisan split.

Now, what that was, and the definition of that was subject of great debate, but we ended up with a plan that I think was fair.

Q. All right. Now, we were talking about the accommodation of incumbents, and accommodating incumbents also meant votes in the legislature. As a general matter, do you have to look at the interest of legislators?

A. Yes, you do. Legislators live in congressional districts. Many times their constituents have been in a congressional district for a long time. They have certain interests that they want to see a congressional district drawn a certain way, so almost every legislator in the General Assembly has an opinion, particularly in his or her own home area about how a district should be drawn.

Q. And do sometimes the different interests of legislators, incumbents conflict?

A. Sometimes they do.

Q. And do they sometimes conflict with the goal of **[*339]** having a 6/6 split?

A. Yes, they do.

Q. Would they sometimes conflict with having a preplan or constitutional plan?

A. Most definitely, yes.

Q. But you have to garner votes?

A. We had to put all of this together and make sure we met all of the tests that the Court laid out for us.

Q. So you might not be able to do some accommodation if you could not create a plan that would be constitutional?

A. Repeat the question, sorry.

Q. Some accommodation might not be made things that people wanted?

A. Yes.

Q. Because it might make the plan vulnerable?

A. Yes. There were requests made that I thought would have made the plan unconstitutional and we just couldn't do it.

Q. Now, the mechanics of the redistricting process itself, did you yourself manipulate the calculations?

A. I did not. I was not in the room and I would give instructions to a person who normally would do the actual mechanical calculations. And most of the time that was Gerry Cohen.

Q. Were you in the room or often allow him to do his **[*340]** work while you were not there?

A. Often allowed him to do his work while I was not there, just on general instructions, yes.

Q. What were the kind of instructions you would give him or what was your working relationship with Mr. Cohen?

A. Gerry is maybe more familiar with maps and precincts and make up and Democratic performance and Republican performance than anybody in the state. He has been working with this for such a long time. I would give him a general idea of what I wanted to do. I would say move a certain county into a certain district or I would just talk to him conceptually about a problem that a legislator would have and would say we need to do something to try to fix this.

Q. Would he ever come back to you with ways he thought that could be accommodated?

A. Yes, he would.

Q. Did you work with other legislators?

A. Yes, I did.

Q. And did you see a lot of plans?

A. Yes. We saw a lot of plans. Many plans were submitted and people had a lot of different ideas about what we ought to do.

Q. Okay. With respect to other legislators, how did you handle the process of getting their input and making sure **[*341]** that you could get your votes?

A. Well, I talked to individual legislators. I told them that if you have ideas, let me know. I did have legislators that would bring plans into the office. Many times they would draw their own district without thinking about the other 11 districts in the state and that would sometimes cause a problem because everything is inter-related, but we had legislators who would draw their own plans and bring them in we would look at that.

We held a public hearing. We let input in from the public. We had discussions, suggestions from the public on what we ought to do.

Judge Boyle: When you say "legislators," you are talking of members of the General Assembly, not members of congress?

The Witness: But members of congress also gave us their ideas.

Judge Boyle: That's what it sounded like. They would come in with a district of their own, not taking into account other districts?

The Witness: That's correct, but we had plans from other state legislators who had interests in this issue they want present us with plans as well as members of congress.

By Ms. Smiley:

[*342] Q. So he might be interested himself in possibly running for office or he's the incumbent?

A. Yes.

Q. I won't make you elaborate on that. My next question, which Judge Boyle has anticipated, is could you describe as well as you can remember the input that you had in your consultation with congress persons or their aides?

A. I think that I talked to every member of congress or his or her representative except for Congressman Taylor in this process.

Q. And is his district really in play?

A. His district is the 11th, the far west, and we did very little to that district and no, that district really was not – pretty much everybody agreed that we ought to straighten up the line a little bit to make it look a little nicer but it was not significantly debated. So I didn't really have occasion to talk to him or any of his staff and he didn't ever contact me. But I did have contact with all of the others, I believe.

Q. And to the extent that you can remember the kind of contact that you had or when in the process?

A. Talked on the telephone, we had one meeting in Raleigh of Democratic members of congress wherein they came to Raleigh and I presented them with some ideas and **[*343]** they presented me with some ideas but most of it was by phone. Some of the members of congress came individually on separate occasions and talked with me.

Many of them, as the judge said, were drawing their own plans and submitting them to me. I think when we had that meeting is when I showed them some of my ideas and so they started working off of that and giving me ideas or suggestions. I think the general idea was many of them wanted to keep a lot of the constituents that they already had because they had a lot of time invested in talking with them and representing them and many of them wanted to do that.

Q. And at that point in time when you started presenting plans or ideas, at least to the delegation, do you remember what the main outline of the plan or what you showed them?

A. It was probably pretty close to what I presented to the Senate committee. I think it was in February sometime.

Q. Before we go there then, let's step back a little. All right. You were talking to legislators and congress people. Did you begin talking with Representative McMahan?

A. Yes.

Q. Could you say when and kind of give us a little **[*344]** history of your discussions with him in the early time before you started negotiating your plans?

A. Very early in the process Representative McMahan and I agreed that we would keep an open dialogue and that we would try to come up with a plan to present to both sides that we both agreed on. So we began discussing principles. We talked about the 6/6 split and wanting to stick to that principle. We talked about making sure that we kept our lines of communication open and we began the process of presenting plans back and forth to each other for each other's consideration.

Q. Was there initial issue based on the plan that the Republicans had presented in the summer of 1996; do you recall where the 12th District was in that plan?

A. Is this the plan that the 12th District ran from Mecklenburg down across the south east to Robeson County?

Q. Yes. And is that an issue you talked with Representative McMahan early on about that?

A. I told him that was just completely unacceptable and that plan would never pass the Democratic Senate.

Q. Was that early in the process?

A. Yes, that was fairly early in the process.

Q. Why?

A. For one thing, probably most importantly, there would be members of the Senate that would think the plan was **[*345]** very much unfair on a partisan basis, because it would have resulted in an 8 to 4 Republican partisan split. And I suspect that was the motivation behind it being presented --

Q. Did it disrupt a good number of Democratic districts in the southern part of the state, south central part of the state?

A. Yes it did.

Q. Okay. So that was one of the early issues you did discuss with Representative McMahan?

A. That's correct.

Q. How did you all resolve that at that time or how did you leave it, when you said that was no go?

A. He pretty much gave up on that pretty early. There were other members of the legislature who wanted to do that for what I believe to be partisan reasons. He understood -- he was being practical, as I was. There were plans out there that would have resulted in a strong Democratic leaning map, and I knew early that this was not going to be a practical solution to the problem so we both understood that and he gave up on that pretty early in the process.

Judge Thornburg: I think this is a good point to break and, Senator, we will start back at 2 o'clock.

(Lunch recess taken.)

[*346] (Witness, Roy Cooper, returns to the witness stand).

Judge Thornburg: You may proceed.

By Ms. Smiley:

Q. Senator, moving farther into the world of redistricting, could you tell us a little bit about the data bases in the computer system and how you used them and, obviously, not a technical answer from you, but --

A. There was data in the computer from 1988 when we had redistricted for 1999 -- excuse me, for the 1990 Census. There was data from election results in 1998 that went into the computer in addition to other demographic information. We used that same information that was from the 1990 Census for redrawing these maps for 1997. There were election results. I think there was a Lieutenant Governors race, a Supreme Court or Superior Court Judges race and a U.S. Senate race that was from 1988 that was in the computer.

Q. What information did you find most useful in looking at District 12?

A. The election results were the predominate number that we looked at in all of the districts. We even had some supplemental election results that we used, but with this overriding issue concerning 6/6 partisan split, the election results were the most predominate numbers. In fact, when we were using the maps, that was generally the **[*347]** number that was up on the screen.

Q. Do you recall which election you felt gave the best indication of Democratic\Republican?

A. That's difficult to say. Probably that judge's race gave the best generic indication, but still that was older data, that was 1988 data. And although it was somewhat useful, it wasn't the primary election information that we used.

Q. What was the primary?

A. The primary information was election results that we received from an organization called the National Committee for an Effective Congress, which was an organization that I think was primarily funded by the National Democratic Party. It's primary function was to help elect Democratic members of congress across the nation and to specifically help with states that were doing congressional redistricting.

Q. And how would you go about getting that information from them?

A. We had a computer link up with our General Assembly map makers with the committee in Washington and whenever there was a map that we wanted to look at their analysis of the map we would send it up electronically and they would send back information to us, giving us election results and telling us what the Democratic performance of **[*348]** the district would be.

Q. And was that data more current than what you had?

A. Yes, it took into account several elections from 1990 to 1996 and the state computer data base only had the 1988 election results.

Q. And was there a particular column that you used on the N.C.E.C. data?

A. There was a column that was an inclusive cumulative performance number that they came up with taking into account all of these elections, and they called it a Democratic performance number. So, for example, if you had a 55 percent Democratic performance, then that would be very good. Below 50 would be of concern.

* * *

[*349] A. Well, the primary concern was to address, as I've testified earlier, the constitutional problems that were cited by the Supreme Court in *Shaw v Hunt*, so that turned us to the 12th Congressional Districts because that specifically was the district that was unconstitutional. The Court had real problems with the long narrow corridors without people, splitting of precincts, point contiguity, crossovers, double-crossovers.

We set out to eliminate all of those problems that they had specifically pointed out in the decision. And **[*350]** also we wanted to make certain that race was not the predominate factor, which is what the Court said that we could not do.

So I began by taking that into account. We also had the practical problem of getting a plan that was passed. So we took the core of all 12 districts, the general area of all 12 districts and began our redistricting process. And I would say that we probably made the most dramatic changes in both the 12th and the 1st Districts from the old map because of the problems that were cited by the Court in *Shaw v Hunt*.

Q. When you talk about the core, what does a core mean to you? Are you talking about the African American core?

A. No. The geographic core, the area the constituents that were in the previous congressional district. If you had started from square one with people who were already in a congressional district with members of congress that already represented areas. If you started at square one, I just don't think we could have drawn a plan that would have passed muster. Even from census to census, most of the time there's a geographic core of the previous district that you start with, so this was really no different than coming from another census, except for the fact that we had the Supreme Court decision that we wanted to address and feel we did address.

[*351] Judge Boyle: Were the changes more substantial in the First and Third than in the 12th, or can you say?

The Witness: I think the 12th was probably as dramatic a change as any that we did. If you look at the map starting in Gastonia with a thin line all the way to Durham, we cut the area of that district almost in half -- excuse me, the length, and significantly broadened it. So I would say the First and the 12th were the two most dramatic changes. There were some changes to the Third. There were some changes to all of them actually, but I think the First and the 12th were the most dramatic because of the constitutional concerns that were raised by the Supreme Court.

* * *

[*352] A. No, we made dramatic changes to the 12th. We took four, I guess it was four, of the counties that were in it before completely out of it.

Judge Boyle: What was your reason for not taking Guilford out of it as you did later in the '98 Plan?

The Witness: Well, your Honor, when you get back to looking at the partisan nature of what we were trying to do, it was a fact that the 12th District was surrounded by Republican leaning districts. And when you looked at Guilford, it made everyone happy from a political standpoint to take the Democratic leaning voters in Guilford and put them in the 12th because it made the 12th a much stronger Democratic district and it made the Sixth District, Congressman Coble's District, much more Republican, which made him happy.

And in addition, there was a geographic symmetry to putting the Triad altogether and making sure that Greensboro, Winston-Salem, High Point, the Triad, was all **[*353]** covered by the 12th. That was connected with Mecklenburg and it was, we thought, I think the third shortest district in the whole state and we thought it made geographic sense to do that.

By Ms. Smiley:

Q. If we may back up a little bit. We jumped a little ahead. Had you and Representative McMahan had any discussions and come to any agreement as you were working on the Senate Plan about the 12th?

A. We came to an agreement that it would go from Mecklenburg to a point in the Triad fairly early on, that that's what we wanted to do. All the members of congress were okay with that. We thought it met the constitutional test because we were cutting off large areas that didn't look nice and we knew that that was going to be a Democratic leaning district. So we decided that the only issue was where we went.

Did we go to Forsyth only, did we go to Guilford only, did we go to Forsyth and High Point, did we go to Forsyth, High Point and Greensboro? We came to the conclusion it made sense to connect them altogether and it made sense to keep the Triad together and it made sense from a partisan perspective that made the 12th more strongly Democratic and made the 6th more strongly Republican, making everyone happy. Getting back to my **[*354]** earlier statement, the people that decide these elections, but we were trying to get a plan that passed and these members of the legislature are looking very carefully at elections and election results, and we were trying to get enough votes to get this plan passed.

Q. Do you recall that at some point there may have only went to High Point?

A. Yes.

Q. At some point you decided to go all the way into Greensboro?

A. Yes.

Q. When that decision was made -- and have you just explained some of the reasons why you made that decision to go to Greensboro?

A. Yes. I mean, it just made sense and it was -- I don't want to be as cavalier as to say "why not," but I mean, it didn't make a whole lot of sense just not -- just to go into Forsyth or just only to go into High Point.

Q. Where could you put those Greensboro Democrats if you don't go --

A. They would natural naturally fall into the 6th District.

* * *

[*356] When you made a decision to go to Greensboro, did you give any instruction to Mr. Cohen or anyone to go to Greensboro and get the blacks or get the black community?

A. No, I did not. I would not have given that type of instruction because that's not the mindset that I had.

Q. And what, in fact, was put into the district, was it just black precincts; if you know?

A. They were mostly Democratic leaning precincts, Democratic voting precincts.

Q. Do you know if most of them were African American?

A. I can not remember and I specifically did not go through and try to remember technically about all of these maps and I can not remember whether there was a majority of African Americans or not. It is obviously a substantial number of African Americans that were in those strongly Democratic leaning districts.

Q. Were there a majority of white precincts from Greensboro that also went into the district?

[*357] A. There were majority white precincts there also. I can't tell you precisely how many. There were a majority of white precincts, but most are all Democratic leaning precincts.

Q. No point in putting them in if they weren't Democratic leaning?

A. Like I say, we were trying to strike this partisan balance. That's not very pretty, but that's the kind of thing that has to happen to get votes.

Q. When you went to Greensboro and the plan extended to Greensboro, were you attempting in any way to achieve a particular racial percentage in the district?

Mr. Everett: Objection, leading.

Judge Thornburg: Overruled.

A. No, we were not. I would say that the fact that it did, the number did go up, that that was fine with me and that was fine with a lot of people who wanted to support Congressman Watt and wanted to make certain that there was incumbent protection, but that was not the primary motive by far. And we did not have a set percentage that we were looking for because specifically the Court told us not to do that, so we didn't do that.

Q. And as ancillary benefit, do you have any idea whether Congressman Coble was satisfied with what happened to Greensboro?

[*358] A. It is my understanding that he was happy with what we did.

Q. All right.

A. Because it increased the Republican performance of his district.

Q. Now, with respect to District 1, when you were at this point you were working on the Senate Plan, do you recall what some of the issues were and what you were thinking about in the eastern part of the state in the District 1 area?

A. Well, I think all of the issues that I talked about in the 12th would be transferred to the First as well. Although the Court had not specifically overturned the First District, we knew that from the way that the map was drawn and, his Honor showed us, talked about down in southeast, we knew we had to do something about that to avoid a constitutional problem with the First District.

So we looked at the core of the district, which was northeastern North Carolina, and we drew a district that I think complies with all of the issues that we had to deal with. We had to deal with the constitutional issue of making sure that race was not the predominate factor and making sure it looked nice.

But also we had some other evidence presented to us, in the redistricting committee, concerning the Voting **[*359]** Rights Act and the fact that there had been some past patterns of discriminatory voting in northeastern North Carolina, that you had a large concentration of African Americans living in the northeastern part of the state and that we should have a majority/minority district in the First, which we did.

Q. I believe -- excuse me, Senator, Exhibit 125, I believe is a map that shows the African American concentration in that area?

A. Yes, uh-huh.

Q. Now, could you -- what does that map illustrate?

A. I think this illustrates that there are numerous counties in northeastern North Carolina that have a high percentage of African American population and that we simply use that core to create the First District. When we first started doing this, I was a little unsure as to whether we could draw a majority/minority district that met the test in *Shaw v. Hunt* and looked nice, but as we went through the process it became pretty clear that we could draw a nice compact district that made geographic sense, that put together communities of interest, that was a strongly leaning Democratic district, that was slightly majority/minority population.

Q. I believe you have in your witness notebook an Exhibit 104, which was the plan that the Senate came out **[*360]** with?

A. I believe that's the plan that I initially presented to the Senate.

Q. And ultimately became the plan that the Senate passed and negotiated with the House?

A. Yes.

Q. Okay. And is that District 1 more compact, possibly than the District 1 in the enacted plan?

A. Yeah. I think we did a little better job than the plan we eventually came up with, but so much of the end of the process to do with the Fourth, the Second, and the Third Districts concerning the partisan nature of those districts, that we had to change parts of the First District in order to accommodate those concerns in order to get a plan to pass. So it evolved from what this plan is now to the plan that we ended up with that I don't think looks quite as nice and compact as this, but I think it's certainly does the job.

Q. Is the District 1, in your Exhibit 104, is that the district that says to you that you can draw a compact African American district and that's why you need to?

A. I would say yes.

* * *

[*362] Q. Briefly, to give the Court a flavor of some of the things you were dealing with.

A. District 2 obviously was a swing district, a hop up district. You just had the election between Congressman [*363] Etheridge and Congressman Thunderburk and the parts and nature of that district was of concern to legislators and the public and people were weighing in on that.

Q. And you had a freshman Democratic congressman in that district?

A. Yes, we did. And the same for the Third Congressional District. Congressman Jones represented that district and he was really the only Republican in the east and Representative McMahan, I think, although he never specifically told me what the conversations were going on, I could see from his actions that he was certainly trying to protect the only Republican congressman that was in the eastern part of the state and that came into the negotiations.

* * *

[*364] Q. Did various concerns with 2, 7 and 4 impact on 1, the shape in terms of where 1 --

A. Yes. Any time you dealt with a problem in those districts, since it is adjacent to 1, the First District, oftentimes you had to move some precincts or move a county. So you had to keep an eye on what was happening with 1 because it all works together, it's a chain reaction.

Q. So whatever you might have wanted to do with 1 or 3, you had to look at all the districts?

A. Yes. Because when you move population out of or into a district, you have to go and make it up somewhere else because we're dealing with 552,000 some odd people that we had to draw and these districts had to keep it under a 1,000 people difference. With the ultimate plan, you have to go right down to the person. So keeping population [*365] even was always a challenge when you had to go and try to fix one problem, you sometimes would create another problem in fixing a problem that you had.

Q. In ultimately drawing District 1, what consideration was given to race?

A. We felt that it was important to have a majority/minority district. Once we found out that you could draw one that met the test of *Shaw v. Hunt*. So from that standpoint, we did pay attention to race to have a majority/minority district.

Q. Now, in the First District was there any particular percentage that you were looking at and that you were talking about?

A. We wanted to have over -- at some point over 50 percent of the population.

Q. Why was that?

A. Just as I testified to earlier, there is a large concentration of African Americans who live in northeastern North Carolina. We felt that the Voting Rights Act would require if there was evidence that was presented to the committee about past patterns of discrimination and it's just the right thing to do, we could do it easily and draw a nice district, and we did it.

* * *

[*368] A. District 1 is a largely agrarian rural district. It has a lot of medium sized towns. I think uniquely eastern North Carolina you have the 30 to 50,000 population towns with largely rural areas. A lot of those counties are largely poorer counties, they are very high up on our economic tiers of depressed counties, so I think that there's a great community of interest in northeastern North Carolina with those counties that are up there.

[*369] A. I met with a group of largely African American constituents, Senator Jeannie Lucas, who represents Durham. I met with them and talked with them a great deal and they very much wanted to remain in the 12th. They very much wanted to remain in Congressman Watt's District 6 because they -- they were satisfied with his representation. It was a largely urban district with the same type of issues that urban Durham has. And we talked and looked at the *Shaw v. Hunt* case, and there was just no way the Court would have accepted a move to the 12th going all the way to Durham County. That just would not work.

Q. What about putting it in the First District?

A. It was discussed, but there was just too much disparity of interest there. I don't think that Durham has a lot of interests that are the same as the agrarian rural northeastern counties and I don't think particularly that the group of people, Senator Lucas, people that I was talking to, very much wanted to be in the First District.

In addition, if you went down and got those precincts in Durham County that had been in Congressman Watt's old district, I think maybe you may have run into a constitutional problem with the First District in reaching out that far. And, also, if you did that, that created a partisan problem for the Fourth District.

Q. What was that problem?

[*370] A. That was a district that was leaning Democratic and if you went and took those Democratic votes out of the Fourth District then you had a problem with the Fourth District no longer necessarily being Democratic leaning. So for all of those reasons, we didn't do that.

* * *

[*372] Q. And can you remember right offhand what were the biggest fights that you had to deal with negotiating to your final plan?

A. Probably the biggest fight was the partisan nature of the 2nd and the 3rd. There were lots of other problems that arose, for example, in trying to shore up the 8th District. The idea was to move east and there were concerns from Congressman Mcintyre that he didn't want the 8th District coming too far into Robeson County. The Lumbee Indians were concerned about being removed from the 7th and going back to the 8th or going into the 8th. And those were problems that we had during the process, but those eventually were ironed out.

Q. Were there immediate problems with District 3 when you and Representative McMahan started negotiating?

A. Yes, there were some problems with District 3. They didn't like the way we had drawn District 3. We didn't particularly like the way they had drawn District 3, but I think we ended up more toward their idea of what District 3 ought to be than our plan.

Q. Now, do you recall one of the easily decided the hottest issues when your plan first came out about District 3 had to do with the incumbent?

A. Well, you mean Walter Jones, Congressman Walter Jones, District 3? The House made certain that he has to **[*373]** be in the 3rd District. His home was in actually the First Congressional District under the '92 Plan and he got elected to the 3rd District anyway, but had received some criticism because he didn't live in the district and that was an important point that Representative McMahan made to me, that they needed to make sure that Congressman Jones resided in the 3rd District.

Judge Boyle: So that incursion that runs in north, west, southeast corridor up into Pitt, to Farmville all is the product of providing a residence for the incumbent?

The Witness: That's how we got there, yes, because his home is somewhere there toward the end of the line. I don't know specifically where his home is. I just know that was an issue and that was -- that's how we had to get up -- he lives in Farmville.

* * *

[*374] Judge Boyle: So if you had devoted all of Pitt and all of Craven -- not all of Craven, but the contiguous part of Craven to the First, you'd have cohesive, geographically cohesive district, but you wouldn't have the Congressman in the district he represents?

The Witness: That's right, because he lives in the Western part of Pitt County.

Judge Boyle: Right. What was the purpose in taking the 3rd around to Lenoir and Wayne?

The Witness: Well, it's hard to pinpoint any one particular reason as to why you did something, but I think one of my earlier plans had put Wayne in the Second District and the House Republicans and Representative McMahan gotten word -- this was from my talking with him, this is what I gleaned -- that since Congressman Jones represented Wayne in the old district, that he very much **[*375]** wanted to continue that representation of Wayne, I believe was one of the reasons why that was done. And, you know, it's -- well, go ahead.

It's hard to remember all of the reasons, because there could have been other ancillary reasons why we did what we did because it's always a chain reaction. But that was one of the reasons I specifically recall because one of my earlier plans had put Wayne in the 2nd, and that was a real concern.

* * *

[*378] A. To convince people, we made a dramatic cosmetic change actually and real geographic change in the 12th District and the 1st District. I talk about how we split less counties and how we had not split precincts except for two of them, that we had tied together communities of interest, that we had a plan that was fair, a partisan balance, a 6/6 split, a plan I thought the public would **[*379]** support and plan that people would have a better knowledge of what district they were in.

Judge Boyle: Do all of those arguments hold true today?

The Witness: For the '97 Plan?

Judge Boyle: Yes, sir.

The Witness: Absolutely. Yes.

Judge Boyle: But the '98 Plan is not geographically compact and you now have the experience of one election under the '98 Plan and none ever run under the '97 Plan, so how do those arguments remain valid?

The Witness: I guess that you can use a compass and a computer to make every district as geographically compact as it can be, but there were many other factors that we considered in this matter. For example if you are looking at the partisan nature of the 12th District, since that's what we mainly dealt with, I think that a Democrat has a much better chance under the '97 Plan than under the '98 Plan.

Judge Boyle: Only as to the 12th District, you make less vulnerable the 5th and 6th and 8th, don't you? So you trade off three districts that conceivably may be "less in play" under the '97 Plan and make one district the 12th, almost a sure thing?

The Witness: Well, I don't think that under the **[*380]** way the voting results have been over the past few years that there would be any chance that a Democrat could win in the 6th and in the 5th and in the 10th, regardless of whether it's the '98 or '97 Plan.

Judge Boyle: But there's marginally more chance in the '98 Plan than in the '97 Plan?

* * *

[*381] Q. Okay. There's been some discussion about whether or not in the '97 Plan that the 8th District could be made more Democratic or some Democrats from Mecklenburg County could go down there and use those Democrats in the 8th. Were there certain constraints about the 8th in the 1997 Plan when you were working on it?

A. Well, at the time we were working on this, the 8th was represented by the dean of the North Carolina delegation, Congressman Bill Hefner, who had been there a long time. He had a strong core of support in the legislature in his district. And one of the things -- one of the results of the plan, although I know that the district eventually was won by a Republican, this time by a slight margin, one of the accomplishments of the plan was to significantly improve the Democratic performance of the 8th District from the 1992 Plan to the 1997 Plan. Congressman Hefner had been elected because he was an incumbent and had been there a long time, but his district had increasingly become more Republican leaning and the best way was to move the district eastward because that's where most of the Democratic voters were. That's what we did, although we didn't move it as far as I wanted to move it. We came into play with Congressman Mcintyre, but **[*382]** Congressman Hefner was satisfied. He was moved out of Rowan and he wanted to keep all of Cabarrus because that was his home county and he did not want to go into Mecklenburg. And to get to the Democratic voters in Mecklenburg, you have to go through strong Republican suburban districts, so that was just never considered and was never an option. Now, there was a plan presented --

Judge Boyle: He had to want to get rid of Moore, too, didn't he?

The Witness: Yes, we did that too. We moved to Cumberland. I lost my train of thought.

Oh, Senator Cochrane had presented a plan similar to Representative Morgan's plan that you asked me about earlier, which went from Mecklenburg all the way to Robeson, but, and I talked with Senator Cochrane about that and other Republicans who were pushing the plan, I just told them from the partisan nature of the plan that it just would not. Democrats and the Senate would not do that and it was viewed as a partisan plan, is what it was viewed as and I think that's probably what it was.

Q. Okay. Now, at some point in time, the plan passed and did you have occasion to go and visit with the Department of Justice?

A. Yes.

Q. Now, I don't believe you were here for Mr. Everett's **[*383]** opening speech, but he has alleged in his opening statement that the state was under the gun to the Department of Justice and their maximization policy and had to draw a black district. In terms of the Department of Justice, had you had any contacts with them when you were drawing the plan?

A. No.

Q. And what was your first contact with them?

A. When I flew to Washington with members of the Attorney General's office and some other people to present the plan to them, that was the first contact I had with the Justice Department.

Q. Was it the last?

A. Yes.

Q. And was it a memorable meeting?

A. No. I mean, I think that they understood the ruling in *Shaw v. Hunt* and there was very little problem with preclearance. I didn't think that that would be a real concern. You never know what Justice is going to do, so we treated it seriously and went up and talked to them about what we had done. And I had mentioned in my deposition numerous times racial fairness was important, and I think the plan was racially fair. That I never thought that that was a serious danger. We were much more concerned with making sure that the plan was **[*384]** constitutional under *Shaw v. Hunt*.

Q. And that it was by partisan?

A. Yes, that was the practical consideration of -- just let me step back a minute. I would very much love to draw these districts in a vaccuum, but you have to get majority votes. In the legislature, partisan considerations come into play, and where people live come into play, and incumbents come into play. And it is very difficult trying to practically and realistically put together majority votes without taking these things under consideration, and that's what we did. I was given a job to do and I wanted to make sure I did it.

Q. And you were attempting to do it in a lawful manner, I suppose?

A. Yes. And I think we ended up with a plan and this was foremost in my mind to serve the public better and I think this plan does. I think this plan is a plan where people can, in general, know where they vote. It's a fair plan.

* * *

[*386] Q. So -- well, the question was: wasn't it necessary? The question I asked you, and you said, didn't you, I have said that we thought that that was the case that we had to do that. Isn't that the question you were asked?

A. Yes. And we had to do it for a variety of reasons. I would have felt more uncomfortable about going for preclearance had we not had a majority/minority in the 1st District.

Q. You would have felt more uncomfortable?

A. Yes, sir.

Q. And you would have felt it wouldn't be approved?

A. That was a potential. I don't know whether that would be the case, but yes, I thought that would be a potential.

Q. Before you went up to the Department of Justice for this meeting, did you have any discussions with the Attorney General's office about preclearance?

A. Yes.

Q. And weren't you advised at that time that it was very unlikely to be precleared without a majority black district?

A. I don't remember specifically whether that was told to me. I do remember Mr. Stein coming to the **[*387]** redistricting committee and other attorneys advocating for a majority/minority district and that there could be Voting Rights Act problems if we didn't do that, but you can do it fairly easily and draw geographically compact district. So it was the right thing to do any way. So for all of those reasons, we did it.

Q. And it would have been wrong not to do it?

A. I think it would have been wrong not to do it.

* * *

[*403] A. I don't think anything is assured. Congressman Watt was an incumbent. We paid attention to all incumbents and, yes, we looked at race. As I testified before, it was important racial fairness, but we did not specifically reach any type of threshold in race in the 12th District.

Q. You say you didn't try to reach any threshold in race. As far as the '97 Plan, the change for the '92 Plan, didn't you basically try to achieve as close to 50 percent as you could get without getting there?

A. No, we did not have any type of goal. We first looked at trying to cure the constitutional defects and made sure that it was still a strongly leaning Democratic district. I think the fact that it has a relatively high number of African Americans is a fine thing. It was a benefit. It was one of the considerations particularly there were as you've asked me before, there were people who were pushing for a higher percentage, but there was also the consideration of making sure that the Sixth **[*404]** District was more Republican. That was something that

Congressman Coble wanted, so all of those factors came into play.

Q. Nevertheless, at the end of the day in 1997, all of the predominately black precincts in Mecklenburg had been in the 1992 Plan were retained in the 1997 Plan; isn't that true?

A. Probably most all of them were, but with the addition of a whole lot more.

Q. And that was because of the deletion of Durham and of this sliver over in Gaston?

A. Because of what the Court told us to do, we had to make sure that this plan looked a whole lot nicer than it did and race didn't predominate.

* * *

[*406] A. We cut off Gaston, we cut off Alamance, we cut off Orange, cut off Durham and took all of those out of the 12 and kept the core, the Triad to Mecklenburg core fattened it, made it look nicer. Took in a lot more Democratic leaning voters, systems as we could and made it a nicer looking district.

Q. In you take in African Americans, add them, you are taking in always also Democratic leaning voters 95 percent of the time; isn't that true?

A. Yes. African Americans generally are strongly Democratic leaning voters, yes.

* * *

[*408] Q. Now, with respect to the map of the 12th District, I just want to be sure on this. Looking at this map, would you be -- and the map is Joint Exhibit 106. Would you be able to identify for me what might be referred to as the "Greensboro black community"?

A. Only by the fact that you have on this map across here precincts that say 40 to 100 percent black. Because of this map, I can point it to you and say, there, but I could not tell you if you gave me a map without that information on it where that would be.

[*409] Q. You would think that area identified by the cross red or the checker red marks on Exhibit 106, those with 40 to 100 percent concentration would be what's referred to as the Greensboro black community?

A. I don't have a concept of what the Greensboro black community ask. If you are taking into account those precincts that have only 40 percent African American, then you have substantially less than the majority of the African American. This is the first time I have seen this map. I wouldn't be able to say where the Greensboro black community would be.

Q. By the same token, were the High Point black community or Winston-Salem or any of the other communities there?

A. Right.

* * *

[*413] Q. Now, there is the last sentence of this e-mail states: I have moved Greensboro black community into the 12th and now need to take about 60,000 out of the 12th.

Do you know what he was referring to when he said he had moved the Greensboro black community?

A. I do not specifically remember even getting this e-mail. And that is not a specific instruction that I would have given to him, but I am presuming that he is talking about moving the part of Greensboro that we had already discussed previously.

He and I at some point had discussed moving the Guilford County area into the 12th and for all of the reasons that I have talked to you about before, making it a stronger Democratic district, connecting the Triad. It made everybody happy.

Obviously, Congressman Coble's district was better, Congressman Watt certainly wanted more of his constituents than he had before and he was certainly happy getting more of those constituents and happy getting a higher percentage of African Americans in his district. And for all of those reasons we decided to go into Guilford County. But I am presuming that this is Mr. Cohen's [*414] descriptive term for that part of Guilford County that we eventually moved into the 12th District.

Q. Now, that's the part that we have been -- we looked at earlier the map that was predominately black?

Ms. Smiley: Objection. Form of the question, unless there's a foundation that he knows.

Judge Thornburg: Overruled.

A. You know, I'm a little embarrassed sitting here. I'm not quite sure whether it's majority African American or not, but I know there's a substantial number of African Americans in that part of Guilford County that we moved to.

* * *

[*422] Q. What, with respect to the cause of balance, did you hear your legislators talking about partisan balance, or was that a concern?

A. Most legislators would want a plan drawn that would be partisan in their party's favor. Partisan balance came about because we had to make sure it passed both chambers, and that became a driving force in the process.

Q. So as far as you could tell, there was no strong feeling when the session began on the part of the legislator individual legislators about maintaining partisan balance?

A. Probably not at that time because they were not thinking about the practical aspects of getting a plan passed. I certainly was and Representative McMahan was. And as the process went forward into 1997, that became a very important issue in my going sure, that we got the plan passed. And it was an issue I think that was good for the public as well.

Q. So in the initial point when they are coming together to begin the session, the legislators would have been more concerned about keeping counties together, not splitting them in redistricting and having minor representation than [*423] they would have been about partisan balance?

Ms. Smiley: Object to the form of the question.

Judge Thornburg: Overruled.

A. I think that's very difficult to say. At that point going into the session, partisan balance hadn't become the important issue that it became once we started negotiating plans. Like I said, that's not the kind of thing that legislators like to talk about publicly. It's not pretty and I don't particularly enjoy sitting here talking about it. But it became a very important issue in the practical problem of getting the plan passed through the legislature.

* * *

[*424] Q. Now, did the issue of minority representation maintain importance as you went through the process?

A. Racial fairness was important to this plan, yes.

Q. Well, by "racial fairness", what do you mean?

A. I believed that we needed to have a majority/minority district in the 1st District, and I think that that went a long way toward racial fairness and that the plan overall was fair to African Americans across the state.

Judge Boyle: Suppose you were in the minority and the opposing party is in the majority and they decided to redistrict and not only went up to 50 percent African American in two districts, but went all the way up to, say, 80 percent. Would that be racial fairness or would that be racial unfairness?

They could make two districts safe beyond belief, but -- and that could be done for partisan reasons, if you follow me. It's a slippery slope you get on when you decide you are going to engage in some use or acknowledgment of race.

[*425] A. Well, that's true, but I did not read the *Shaw v. Hunt* case to say we were doing race.

Judge Boyle: So politics could override race if politics were the true star of your decision?

The Witness: Yes, it could have been, could have.

Judge Boyle: Some party could decide they would put 80 percent minority in a district and thereby deprive their opponents of what would be predictable support in another district?

The Witness: Well, I think it's very, very difficult to draw a district in North Carolina with an extremely high percentage of African Americans under *Shaw v. Hunt*.

Judge Boyle: But you did it in '92 in District 1. All you would have to do would be to hopscotch around to other counties. In the 7th, you could make it more minority/majority than it is now.

The Witness: The Supreme Court told us we couldn't do that.

Judge Boyle: I thought when you went back in '97, you felt like you had to do that in order to pass the Justice Department?

The Witness: No, not with respect to the 12th. With respect to the 1st, we thought that it was important [*426] to have a majority/minority district; that wasn't the overriding factor. If we could not draw a district that looked reasonably geographically compact and met the other criteria, then we would not have drawn a majority/minority district. But it all fit nicely together, so that's why we did it.

Judge Voorhees: Now, you testified that the legislature, in coming up and reviewing various plans over the process of developing the '97 Plan, was mindful of the court decision in the *Shaw* case and Voting Rights Act and the other factors that you have mentioned.

Now, would it be accurate to say that the various members of your committee and of the legislature were cognizant of the percentages of minors who were being placed into the various districts, but particularly the 12th and the 1st?

The Witness: Yes. I mean, that was something that was printed out for every district and yes, everyone would have looked at that figure and some members would have cared more about it than others.

Judge Voorhees: I may have misunderstood you earlier. I thought you said you didn't know what the final percentage was on 12 when the '97 Plan was enacted.

The Witness: I did. I'm sure that I did. Yes, I did.

[*427] Judge Voorhees: If I thought otherwise, I just misunderstood what you said?

The Witness: I think he asked me what percentage of African Americans were in Guilford County that we put into the 12th. I can't remember. I didn't remember that particular figure.

Judge Voorhees: I think the question had to do with whether you were trying -- that the relevant powers in the legislature were trying to keep the number just under 50 percent?

The Witness: No, that was not.

Judge Voorhees: You say you weren't trying to do that?

The Witness: No.

Judge Voorhees: In so saying, you are not saying the legislature was not aware of the plans discussed?

The Witness: We did know, absolutely we knew a lot of people I think were happier the African American percentage went up as a result of Guilford County being moved into the 12th.

Judge Voorhees: Was there a viable motive within the legislature to keep it just below 50?

The Witness: No.

Judge Voorhees: The final percentage was sheer **[*428]** happenstance?

The Witness: Absolutely. I mean, if you were trying to do that, then you would be running afoul of what the Court told us to do and that's just not what we did.

Judge Voorhees: All right.

* * *

[*429] Q. I'm reading what purports to be a copy of a statement you made to the March 25, 1997, meeting of the House committee. I think that overall it provides for a fair geographical, racial and partisan balance throughout the State of North Carolina. Now, what were you referring to? Was that the plan that you were referring to?

A. I would assume that that's what I was referring to. I said many times I thought the plan was racially fair and --

Q. Racially fair. What do you mean by "racial balance"?

A. I don't know. I don't know what particular context I was making.

Q. Well, let me ask you this: Do you know what you mean by "partisan balance"?

A. Yes, sir.

Q. What does that mean?

[*430] A. Keeping the 6/6 split.

Q. All right. When you use the term "racial balance," wouldn't it follow that you were referring to maintaining a 10 to 2 racial balance between Whites and African Americans in congressional delegation?

A. No. I think I testified in the deposition and the testimony earlier that African Americans would have a fair shot to win both the First and the 12th Districts, and I think that's racially fair.

Your Honor was asking me, I think you had gotten the impression that we didn't pay any attention to race, but we did pay attention to race. That was one of the factors that was considered. But it was certainly not the predominate factor. I talked about why all the different reasons, why we did the Mecklenburg to the Triad District and certainly the fact that an African American has a fair shot at winning that district is part of racial fairness and I have testified to that.

Q. I want to ask you more about what you mean by "fair shot." With respect to the earlier testimony you gave and testimony you gave at the deposition, didn't you say that you were -- you had to have a majority black First District?

A. For a lot of reasons I thought that was a very important thing to do.

[*431] Q. And I asked you whether it was necessary to have it?

A. I don't know whether it was necessary or not. I think probably it was important for three reasons. It was numerous reasons, but, one, I think trying to get votes into the General Assembly. I think we would have lost a lot of votes if we had

not done that. Secondly, we may have run afoul of the Voting Rights Act if we had not done that. So all of those things together were important. I thought we had a lot of interest that we needed to make sure to keeping the agrarian core all of that was important in dealing with the First.

Q. You might have run afoul on preclearance with the Department of Justice under Section 5?

A. We may have.

Q. When you say something "had to be", doesn't that mean that's a predominate motive?

A. Well, I think that it needed to be and should have been for many reasons, and I have given you those reasons. It being the right thing to do. Needing the votes, past history of discrimination, voting patterns, potential Voting Rights Act, violations, preclearance, all of those things added up. This is something we ought to do, so we did it.

Q. You should -- when you say you "had to", doesn't that mean it was mandatory and that was predominant?

[*432] A. I don't know what your question means about who was making it mandatory. All of those things told us that we needed to do it, so we did it.

Q. I believe you earlier testified that you thought it had to be done?

Ms. Smiley: Asked and answered, your Honor.

A. To get the plan passed, because it's the right thing to do, because it may run afoul of the Voting Rights Act. If we don't -- you can draw a nice compact district by doing it. All of those things add up.

Q. But didn't you say that having a majority black First District was something that had -- you said was not to be compromised? Did you -- didn't you say that?

A. I don't remember that exact language, but I think it -- I would agree with that. Yes, I think it was important.

Q. So, basically, as you viewed the legislature had no choice but to create --

A. Of course we had a choice, we could have not done it.

Q. You would have been close?

A. Probably close to that.

Q. Wasn't it your testimony if you would have any plan at all you would have to have a majority black district?

A. That was very important. I'm not going to sit here and testify that we just simply would not have passed the **[*433]** plan if that had not been the case, but it's close to that. It was very important for all the reasons that I said.

* * *

[*436] Q. I'm going to ask you if indeed there are 60,000 African Americans in Greensboro and the precincts are in the 12th District. Do you have any interpretation of the sentence as to "now need to take about 60,000 out of the 12th" in the e-mail which was directed to you?

Ms. Smiley: Object to speculation.

[*437] Judge Thornburg: Overruled, if he knows.

A. I don't know everything that -- I don't specifically remember this e-mail for one thing; and secondly, I don't know all the other things going on at the time. But I would presume -- and I know I'm not supposed to presume, but I presume the 60,000 we're talking about is total population of needing. If he went to Greensboro and put an area in Greensboro into the 12th that now he needed to take 60,000 people out of the 12th in order to make the population correct. That's what I presume.

Q. Wouldn't you also presume that the Greensboro black community approximated 60,000 when you read that?

A. No, I would not. We certainly don't believe they were all African Americans in Guilford County that were put into the district. We looked at the Democratic leaning districts in Guilford County, and for all the reasons I stated, we put them in the 12th.

* * *

[*438] Q. Let me ask you about earlier provisions, statements in this e-mail where it begins by stating: by shifting areas in Beaufort, Pitt, Craven Counties, I was able to boost the minority percentage in the 1st District from 48.1 percent to 49.25 percent. The District was only as the white percentage was 49.67 percent.

Do you recall a change in the plans that were being prepared by Mr. Cohen, under your general direction, which achieved such a boost in the minority percentage?

A. I don't remember this e-mail specifically and I do not remember these specific instructions about counties and precincts, but I do know when we were dealing with the 2nd and the 3rd and all of those things that go in between, that sometimes because it's beside the 1st, sometimes we would drop below or just below **[*439]** majority/minority and we would have to do things from time to time to have a majority/minority, but not radical types of moves. This e-mail, obviously, I don't remember it specifically, but reading it now had to do with that issue of African Americans and what percentage. You know, it could be that Gerry was just had that on his mind and used in that last sentence, used black community and Greensboro as a descriptive term. I don't know, that's not something that I would have instructed him to do.

Q. Now, the next sentence: This was all the district could be improved by switching between the 1st and 3rd. And then reading further down, as to improvement, isn't it pretty clear that Mr. Cohen viewed it as an improvement to increase the African American percentage?

A. I don't know what he was thinking, but, I mean, it's pretty clear that at this point we were in one of those times where we were trying to make sure that the district had majority/minority and he was probably operating under some other parameters in the 1st that he couldn't move for some reason or another, and I don't know what stage of the process this was.

Q. Isn't it pretty clear, Senator, that he was informing you that he believed at least he was improving the district, he was informing you and Senator Leslie Winner that he was improving the district by switching precincts **[*440]** and increasing the African American percentage?

A. I don't remember this specifically of the ones again, but probably we were in one of those situations where we had moved something in the First District dropped a little below 50 percent and we were getting it back up again, and that's what he meant by improvement, but I don't remember specifically.

Q. And that would be in line with your belief that you had to have over 50 percent?

A. Yes, sir.

Q. And you were getting there one way or the other and he was looking at all the options?

A. Not one way or the other, we had to get there making sure we had a compact district that looked good, that complied with *Shaw v. Hunt* and took into account all the other considerations I testified to here today.

* * *

[*441] Q. So you gave this statement to the Senate and wouldn't it be inferred from that statement that *Shaw v. Hunt* was **[*442]** inapplicable as long as you didn't get to 50 percent?

A. Let me tell you why I made that statement. It had not really occurred to me until this final plan had been prepared, that this was an argument for constitutionality that it wasn't a majority/minority district.

In fact, Mr. Everett, you were over in the General Assembly and you came to see me and several other people and were telling people this was an unconstitutional plan. And a lot of people have a lot of respect for you, including me, and there were people who began to ask me questions about the constitutionality of the plan. And in all of the other reasons that I gave I think were good arguments for the constitutionality, but this was an argument that came to mind said, wait a minute, where should the Court start looking at this issue as to when a district is predominately racial? And it became clear, made common sense to argue at least the process for the sake of argument that the test should not even be triggered if you don't have a majority/minority.

I didn't start out this process by trying to get it just under majority/minority for that reason. That was an idea and an argument that came to me later on in the process and I consulted with the Attorney General's office. They said that's a good argument to make, and I made it.

AFFIDAVIT OF W. EDWIN MCMAHAN (WITHOUT RESUME)

[Caption Omitted in Printing]

AFFIDAVIT OF W. EDWIN MCMAHAN

W. Edwin McMahan, being first duly sworn, deposes and says:

1. I am a native of Buncombe County, North Carolina and have resided in Charlotte, North Carolina since 1974. A copy of my resume is attached.

2. In 1994 and 1996, I was elected to the North Carolina House of Representatives. During the 1997 Session of the General Assembly, Harold J. Brubaker, Speaker of the House, appointed me to serve as Chairman of the House Congressional Redistricting Committee. I had no previous involvement in congressional redistricting.

3. My responsibility as Chairman of the House Redistricting Committee was to attempt to develop a new congressional plan that would cure the constitutional defects in the prior plan, and that would have the support of a majority of the members of the Senate, which was controlled by the Democrats, and the support of a majority of the members of the House, which was controlled by the Republicans. Under an order entered by the three-judge court in *Shaw v. Hunt*, that task had to be completed by March 31, 1997, to avoid the federal court imposing a plan on the State.

4. Senator Roy A. Cooper, III, was appointed Chairman of the Senate Redistricting Committee by President

Pro Tem Marc Basnight. His responsibilities were essentially identical to mine.

5. Many people doubted that the General Assembly would be able to achieve a compromise between the Democratic controlled Senate and Republican controlled House on the most partisan legislative task, redistricting. Working with the leadership of the Senate and the House respectively, however, Senator Cooper and I early on identified a single path by which a compromise might be reached and a new plan adopted. This path was to craft a plan which would cure the defects in the old plan and at the same time preserve the existing partisan balance (6 Republicans and 6 Democrats) in the State's congressional delegation.

6. To cure the constitutional defects in the prior plan, we had to be sure that traditional redistricting criteria were not subordinated to race. To achieve this goal, the leadership of the House and I wanted to avoid splitting any precincts, to avoid splitting counties when reasonably possible, to eliminate all of the "cross-overs," "double cross-overs" and "points of contiguity" from the prior plans, to facilitate communication among voters in a district and their representatives in Congress, and to place citizens with similar needs and interests in the same districts to the extent reasonably possible.

7. To protect the existing partisan balance, the leadership of the House and I recognized that we would need to protect incumbents and to preserve the cores of the prior districts to the extent consistent with our goal of curing the defects in the prior plans. The means I used to check on the partisan nature of proposed new districts was the election results in the General Assembly's computer data base (the 1990 Helms-Gantt election and the 1988 elections for Lieutenant Governor and one of the Court of Appeals seats). I also used more recent election results to evaluate the proposed Districts 2 and 4 -- the districts that we felt were the most competitive from a partisan viewpoint.

8. On February 20, 1997, Senator Cooper presented Congressional Plan A to the Senate Redistricting Committee and on February 25, 1997, I presented Congressional Plan A.1, to the House Redistricting Committee. Congressional Plan A and A.1 were similar.

9. Over the next several weeks Senator Cooper and I were able to resolve the few differences between the two plans. The compromise we finally reached is reflected in a plan entitled "97 House/Senate Plan A." This is the plan that was enacted by the General Assembly on March 31, 1997. It achieves the goals the leadership of the House and I had. It cures the constitutional defects in the prior plan and it protects the existing partisan balance in the State's Congressional delegation. The plan also meets one-person, one-vote requirements and, with regard to District 1, meets Voting Act requirements.

10. 97 House/Senate Plan A is not an unconstitutional racial gerrymander. 97 House/Senate Plan A is a negotiated bipartisan plan which contains districts located and shaped in a manner to avoid constitutional problems and to protect the existing partisan balance in the State's Congressional delegation. Racial fairness was, of course, considered in the development of the plan. Our obligations to represent all of our constituents of all races and to comply with

the Voting Rights Act demanded that racial fairness be considered. The plan enacted is racially fair, but race for the sake of race was not the dominate or controlling factor in the development or enactment of the plan. The dominate and controlling factors in developing the plan were (1) curing the constitutional defects in the prior plan and (2) protecting the existing partisan balance. Two indications that race was not dominate in drawing the plan are the fact that 12 of the 17 members of the House who are black voted against 97 House/Senate Plan A and the fact that two black members of the House, Representatives Fitch and Michaux, have claimed that the plan we enacted is not racially fair to blacks.

11. The efforts by the House of Representatives to meet their responsibilities in enacting a new congressional redistricting plan are recorded in the transcripts of the meetings of the House Redistricting Committee and the debate on the floor of the House. A true copy of these transcripts is included in the North Carolina Section 5 Submission, 1997 Congressional Redistricting Plan (filed with the Affidavit of Gary O. Bartlett) as Attachments 97C-28F-4E(1) through 97C-28F-4F(1).

This the 26th day of February, 1998.

/s/ W. Edwin McMahan

Sworn to and subscribed before me this
26th day of February, 1998.
/s/ Frances S. Carraway
Notary Public
My commission expires: 12/20/99

W. EDWIN MCMAHAN, TRIAL TESTIMONY (SELECTED PORTIONS)

[*462] W. Edwin McMahan, being first duly sworn, testified as follows during cross examination:

By Mr. Everett:

Q. Representative McMahan, I just want to ask you a few questions. You, of course, are Representative McMahan as identified in the deposition.

With respect to the formulation of the 1997 Plan and its boundaries, to the extent there was a difference in participation in the origin of the plan, was it your **[*463]** recollection that the final details of that emerged more from the Senate committee or from your committee?

A. My recollection is that it actually came probably more from the chairs of the two committees negotiating individually.

Q. All right. And with respect to your deposition, at the time you had rather limited recollection of some of the events, as I recall, are there any of the answers -- have you reread your deposition in preparation for the appearance today?

A. Yes, sir, I have.

Q. Is there anything in the deposition that you did at the time of the deposition you did not recall that you now recall more fully?

A. Having read the deposition and some of the answers that -- well, actually, no I think the deposition is a fair representation of what I intended to say.

Q. And at what point, with respect to the 1st District in the plan at the time, you indicated that in its formulation race was a predominate factor -- well, was a huge factor, as I believe you stated. Is that still your recollection?

A. District 1, no question is because of the makeup of the House on our side and the number of minorities that we had to deal with on the House side. Certainly, when we **[*464]** looked at District 1, race was a factor and we determined early on that we could draw that district and make it more compact and geographically compact and also address the race issue.

Q. But was it your belief that it was necessary to have a majority/minority district in order to obtain preclearance?

A. Yes, sir, one district, yes sir.

Q. And that was the one in the northeast?

A. That's correct, sir.

Q. So in your instructions to Mr. Jones, who was your resident, did you inform him of this particular determination?

A. Again, we looked at one, it ws never really a big issue as far as whether it would be a majority/minority district because what we were doing is primarily looking at it to make it more compact. And it certainly, from the very beginning, as Linwood Jones drew the map and we talked with the Senator and looked at it, it could be done, the majority/minority,as well as geographically compact.

Q. Now, was it then your testimony that the objective, the purpose of having a majority, black majority African American district in the northeast was a purpose that you were not going to compromise. You were going to get there **[*465]** one way or the other?

A. Well, it was one of the factors certainly that we needed to address.

Q. And did you have a belief from what you had been informed that without that particular district it would not be -- the plan would not be precleared if that were not a majority black district?

A. I certainly recall that we felt, in order to get preclearance, it would need to be a majority/minority district.

Q. Finally did you develop alternatives which you felt were more compact than those that were finally adopted for a majority district?

A. Would you repeat the question?

Q. In other words, in your planning, did you perceive ways of getting to a majority black district that were more compact than those that were in the plan that was more final adopted?

A. We were dealing with a situation where we needed to satisfy a lot of people to get the plan approved. So even though we might have been able to draw it more compact, it was other factors that led to us drawing it the way we did.

Mr. Everett: I have no further questions.

Judge Boyle: Was it your understanding, as you **[*466]** approached redistricting in 1997, that the 1st District, as composed in the '92 Plan, was facially in violation of the Constitution?

The Witness: No, sir, we did not look at District 1 as being in violation of the Constitution.

Judge Boyle: How about District 12?

The Witness: We knew that the three judge panel had ruled it to be in violation of the Constitution in District 12.

Judge Boyle: No, they hadn't, the Supreme Court had.

The Witness: I'm sorry.

Judge Boyle: So the U.S. Supreme Court told you District 12 violated the Equal Protection Clause and you could not continue to use that?

The Witness: That's correct, sir.

Judge Boyle: That's why you were in the redistricting exercise in '97?

The Witness: Yes, sir.

Judge Boyle: But as to District 1, without the Supreme Court directly speaking to that, was it the sense and understanding of the House that that district was likewise in violation of the U.S. Constitution as composed?

The Witness: Sir, as I think I said in my **[*467]** deposition, when I looked at District 1, having known the ruling on District 12, in my mind as a layman and not an attorney, it certainly appeared to me that we did need to make some changes in District 1 the way it had been drawn in 1992.

Judge Boyle: Does that mean there was a recognition you could not repromulgate District 1 in its then existing form? Do you want me to say it again?

The Witness: Please.

Judge Boyle: Was there the sense or the understanding of the House that you would not be able to effectively or constitutionally repromulgate, readopt, District 1 in the same form as it existed in the '92 Plan?

The Witness: Well, again, we felt it was our responsibility to look at the map and where we could make changes and make fewer counties divided, no precincts hopefully divided, which certainly included District 1. Because of the way it was drawn, it went all the way across the eastern part of the State. We felt it was our responsibility to make changes, yes, sir.

Judge Boyle: Thank you.

Judge Thornburg: Your concern at that point was primarily compactness as opposed to racial matters?

The Witness: Yes, sir. The biggest concern we had, when Senator Cooper and I first sat down and talked **[*468]** about it was, of course, maintaining the balance. The 6/6 balance was very, very important as well as geographic compactness, because at that time there were like 80 counties divided and a number of precincts, maybe 80 precincts were divided, but a lot of division there we felt like we needed to correct.

Judge Thornburg: Thank you.

Mr. Everett: May I ask a couple follow up questions to Judge Boyle, so there's no misunderstanding?

Judge Thornburg: Yes, sir.

By Mr. Everett:

Q. I'm trying to find -- here is the 1992 Plan and up here is the First District. You are not a lawyer?

A. (Witness nods head.)

Q. You were dealing with Mr. Cooper, who was a lawyer; you had Mr. Linwood Jones, who was a lawyer. I'm going to put it to you simply with respect to the 1st District in the 1992 Plan, which extended from the Virginia border almost down to South Carolina. Didn't you, on the basis of what you were told when you became chair of that committee, believe that that was an unconstitutional district?

Ms. Smiley: Object, asking him for legal opinion, your Honor.

Judge Thornburg: Overruled.

[*469] A. Judge Everett, again, I could look at that district, and knowing the problems with District 12, that we needed to also try to see if we could make it more geographically compact. That's what we tried to do. We could do both, you know, make it more compact as well as satisfy the requirements on racial fairness.

Q. I hate to pressure you for a yes or no answer, but are you able to give a yes or no answer to whether you thought it was unconstitutional at that time?

A. I certainly felt that it needed to be redrawn. Whether it was because it was unconstitutional or because you could look at it and tell it needed to be redrawn, I'm not sure, Judge Everett.

Q. You are saying you are not sure whether you had belief one way or the other?

A. No, sir, I'm not.

Q. Let me ask you this: with respect to this district, which had been held unconstitutional by the Supreme Court, was it your belief that you could reconstitute this District without being subject to any issue as to constitutionality if you got the percentage of African Americans below 50 percent?

A. Judge Everett, the percentage was not the fact that we considered. It was primarily the fact that we felt the reason it was unconstitutional was because, again, the way **[*470]** it was drawn and so even though, you know, the racial fairness entered into it, it was not one -- it was one of a number of factors. I think geographic compactness was more important, we felt, than the racial percentage.

Q. Let me ask you this, then: when you got ready to present the plan to the House, didn't you, in fact, tell them that a reason for allowing or having the new plan, which I believe is right

here, the reason for allowing it was that it was below 50 percent African American and, therefore, the shape didn't matter?

A. Judge Everett, I was asked that in my deposition. I went back and read the minutes. I did say that on the floor as one of the factors. I'm not an attorney. I didn't mean to interpret that to mean it's now constitutionally correct. I quite honestly, you know, Senator Cooper made that statement and I had picked up on that and that was the reason that I actually made that statement.

Q. So on the basis of what Senator Cooper told you or statement that he had made, and in trying to persuade the House members to adopt the plan, you so informed them with respect to the 12th District in the 1997 Plan?

A. As far as the racial percentage?

Q. Yes.

A. I think the question was asked, what was the racial **[*471]** percentage? I can assure you, though, that was not the primary objective that we had in drawing 12, was to try to maintain a certain percentage of minorities.

Q. Didn't you specifically say that you had gotten it up to 46 percent or above 46 percent? Didn't you tell the members of the House that you had done the best you could in order to satisfy the Department of Justice and satisfy the courts?

A. Well, again, racial fairness was an issue and I had to deal with the House that had 18 minor members, so it was certainly an issue and people had asked the question of where the percentage was, but, again, our first attempt, I think was like 40 percent. We were trying to make it as Republican as possible and make it fair for Republicans to have a chance, but, again, it was not the main issue, the percentage, but I did answer the question that it was 46 percent.

Q. So it went up to 40 percent where you proposed to have it up to 46 percent and that was at persistence of the Democrats?

A. The Senate Plan was 46 percent.

Q. Insofar as the members of the House were concerned, African members, were they in favor, as expressed to you, as having the higher percentage of African Americans in the 12th District as possible?

[*472] A. Yes, sir, they were.

Q. And with respect to the 1st District, was that the same?

A. Yes, sir.

Q. And they were a very significant force in the House at that time?

A. They were certainly a force that I had to deal with along with a lot of other factors.

Q. And the partisan breakdown of the House at that time was 61/59?

A. Yes, sir, that's correct.

Mr. Everett: Thank you, your Honors.

Judge Voorhees: Now, you said that you felt the 1st District needed to be redrawn from the '92 Plan and that you weren't sure whether that was because of constitutional concern or because it just needed to have more compact shape?

The Witness: Yes, sir. We, of course, did not get any kind of ruling on One, but it was only a 12. But when we looked at the map again, we were trying to look at the map overall, primarily to address 12, but that affected the other districts. And when I looked at one, it was felt by Senator Cooper and myself it did need to be looked at and redrawn because of the way it was configured.

[*473] Judge Voorhees: The reason for that is the Supreme Court sent a concern about shape?

The Witness: Yes, sir.

Judge Voorhees: So whether it was a fundamental concern or specific concern that the Supreme Court voiced about shape, that's still the reason why you felt it had to be reconfigured?

The Witness: Again, I'm not an attorney; that's my interpretation.

Judge Voorhees: Would that have been the sense of your colleagues, as far as you could tell?

The Witness: Yes, sir, I believe so.

Judge Thornburg: Are there any questions by defense that aren't covered in the deposition and the affidavit or by way of explanation of what's been asked here this morning?

Ms. Harrell: We would like to ask a few, your Honor. If I may approach the witness and give him a notebooks? He's not going to use most of them. This was prepared way in advance.

Judge Thornburg: All right.

Redirect Examination

By Ms. Harrell:

Q. Representative McMahan, you referred to your plan a few moments ago. Were you speaking about the plan that **[*474]** you presented to the House committee?

A. Yes, sir -- yes, ma'am.

Q. And could you look at the Joint Exhibit 105, Representative McMahan?

A. Okay.

Q. And is that labeled House Selecting '97 Congressional Plan 8.1?

A. Yes, it is.

Q. And is that the plan that you were speaking about that you presented to the House committee?

A. Ms. Harrell, I believe so. You know, when you look at these maps, it takes a little bit of time to make sure, but I believe that's it. I do recall it was labeled 8.1.

Q. All right. And did you refer to the percentage of minorities in your Senate District 12 in your House Plan?

A. As I recall, it was 40 percent having read the information in the minutes of the meetings.

Q. All right. And were you trying to make the Senate 12th District in your plan more competitive or less competitive for Republicans?

A. We were trying, obviously, to make it more competitive for Republicans.

Q. And when you became Chairman of the House Congressional Redistricting Committee, did you meet early on with Senator Cooper?

[*475] A. Yes, we did.

Q. And based on your understanding with your meeting with Senator Cooper, what were your overall goals in trying to steer this plan through the committee?

A. Again, he and I sat down and talked about what we thought was necessary in order to get this approved. I don't think very few people in the legislature felt that we could do it, that we could get the bodies together because, of course, the House was Republican and the Senate was Democratic. So we sat down and said let's try to see what's important to you and important to me and see if we can bring it together.

Several of the factors, the primary factors, of course, he and I both agreed on was maintaining the 6/6 balance, which currently existed in the congressional delegation. And we needed to make sure we did that. We wanted to try to look at geographic compactness and divide as few counties and no precincts, if it was possible. It ended up we did a good job on that. We talked about racial fairness. We knew we would have to address to that. On the House side, certainly had a substantial number of minorities I would have to deal with and talk to and we wanted to be fair.

So geographic compactness and, of course, the incumbency issue. We were -- obviously knew that, you **[*476]** know, that it was probably important to try to protect as many of the incumbents as we could. So those were the overall, I think the majority of the issues that we agreed that would have to be addressed.

Q. Just briefly, what was the district that you were concerned about in the negotiations?

A. The one we spent the most time on, as it turned out, would be 2 and 4, and then 3 was important, too, because those were the districts that the numbers were very close on. And we were trying to make sure, again, to maintain this 6/6 balance. So 3, 2 and 4 got more attention, as it turned out, than any of the others.

Q. Okay. And are 2 and 4 both held by Democratic incumbents?

A. Yes, they are.

Q. What were you trying to do with regard to those districts?

A. Well, we -- 3 actually is -- the numbers indicated it's Democratic even though it's held by a Republican, so the Senate was trying to make 3 as Democratic as possible; I was trying to make 2 as Republican as possible.

Q. Okay. And if I could ask you to look also at Joint Exhibit No. 134. You have one of those in your notebook, Representative McMahan, Exhibit 134. And that's the labeled House '97 Congressional Plan A. You have that **[*477]** before you?

A. Yes.

Q. Is this a plan before you considered your A-1 to the House Committee?

A. Yes. This was, I think, the first plan that Linwood Jones and I redrew.

Q. And with regard to trying to work with minority members of the House, were you able to persuade them to support your bill?

A. As it turned out, the majority of them voted against it on the House side.

Q. And overall, would you say that you were able to accomplish the goals that you started out with regard to the redistricting process?

A. Yes, I was very pleased that we were able and I think actually Senator Cooper was surprised that we were able to get it approved with the numbers we did on the House side.

Judge Voorhees: What were the numbers, do you recall?

The Witness: Sir, I believe we had 85 positive votes, as I recall. I know it was 55 Republicans, I believe, that voted for it on our side, but I believe like 85.

By Ms. Harrell:

Q. And did you feel like the basic objectives that you **[*478]** started out with were met in the plan?

A. Yes, ma'am, I do.

Judge Thornburg: Did you say a majority of the minority members of the House voted against?

The Witness: Yes, sir, they did, which actually was a surprise, because I tried to work with them as we went along, but they offered a number of amendments on the floor because they were disturbed. They didn't think District 12 was strong enough, you know, the minority, they didn't have enough influence in District 12. So they offered amendments on the floor to actually put it back more like it existed on the '92 Plan, but we were able to defeat those amendments.

Judge Boyle: Were they trying to add Durham back to it?

The Witness: I believe Representative Michaux brought it back to Durham, I believe so.

Judge Boyle: They didn't care about losing Gastonia.

The Witness: I think that's correct.

Mr. Everett: May I ask one or two other questions? I'll be brief.

Judge Thornburg: All right, sir.

Recross examination

By Mr. Everett:

[*479] Q. The questions were asked of you by Ms. Harrell about the area of dispute, major controversy that was over around 2 and 4?

A. Yes, sir.

Q. So then would it be correct that 12, the idea of 12 was 46 percent, or thereabouts, was accepted as a starting point not to be compromised. You are not going to compromise that part; the big dispute was to 2 and 4?

Ms. Smiley: Objection.

Judge Thornburg: Overruled.

A. The percentage was not -- we didn't discuss, Senator Cooper and I, the actual percentage that needed to be.

Q. Whatever it was, this was sort of a starting point to have this district with whatever the percentage of African Americans was?

A. Well, again, what we tried to do was look at it from the geographic compactness to make it acceptable in the fact of not making it any longer from one end to the other than other districts were. And, again, the actual percentage came out at the end because people asked for it, but it was not what Senator Cooper and I discussed as one of the criterias.

Q. I wanted to be sure I understand then. You are saying this 12th District, as shown here, is now geographically compact?

Affidavit of David W. Peterson, PhD (without attachment)

[Caption Omitted in Printing]

AFFIDAVIT OF DAVID W. PETERSON, PHD

DAVID W. PETERSON, PHD, being duly sworn, deposes and declares the following:

Identity

1. I am president of PRI Associates, Incorporated, a company whose chief activity is providing statistical litigation support. I am also recently retired as Adjunct Professor in the Institute of Statistics and Decision Sciences at Duke University, Durham, North Carolina, where for more than twenty years I taught courses in the theory and application of statistics. I am co-author of a book entitled *Use of Statistics in Equal Employment Opportunity Litigation*, the guest editor of a special issue of the journal *Law and Contemporary Problems* devoted to statistical inference in litigation, and the contributor of a chapter to each of two other books on the use of statistics in litigation. I have testified as an expert statistical witness in more than thirty cases in federal district courts around the nation, including the Eastern District of North Carolina, and worked with legal teams as a statistical expert in more than two hundred different cases. I have testified for and advised defendants as well as plaintiffs.

Assignment

2. I am retained in this matter by the defendant to examine the statistical relationship between the boundary of North Carolina's Twelfth Congressional District as created by the North Carolina General Assembly on March 31, 1997 and the racial and political makeup of the residents in that District and the surrounding area. In particular, I am asked to determine the extent to which political affiliation might explain as well as, or better than, race the boundary of District Twelve. Most particularly, I am asked to determine whether, based on the statistical pattern of association relating the boundary of the Twelfth District and the racial and political makeup of nearby residents, race appears to have been the predominant factor in defining that boundary.

Conclusions

3. Based on an examination of the data available to me, I conclude that

a. There is a substantial correlation between the path taken by the boundary of the Twelfth district and the political preferences of the residents of the precincts touching that boundary, the tendency being to include precincts within the District which have relatively high Democratic party representation.

b. There is also a substantial correlation between the path taken by the boundary of the Twelfth District and the racial composition of the residents of the precincts touching that boundary, the tendency being to include precincts within the District which have relatively high black representation.

c. Because the correlation found in a. is as large or larger than that found in b., it follows that the path taken by the boundary of the Twelfth District can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations. In other words, there is no statistical indication that race was the predominant factor determining the border of the Twelfth District; there is at least one other explanation that fits the data as well as or better than race, and that explanation is political identification.

d. There is a substantial correlation, precinct by precinct, between the fraction of a precinct's residents who are black and the fraction who favor the Democratic political party over the Republican.

e. Among the few border precincts where the above correlation does not exist, the boundary of the Twelfth District appears to have been drawn at least as much with the purpose of creating a Democratic majority within the District as with creating a black majority.

f. I also determined that blacks constitute less than half of the residents of District Twelve, and that people who identify more strongly with the Democratic Party than the Republican Party constitute more than half the residents of that District. This lends further credence to conclusions c. and e., above.

Underlying Data

4. The information on which my conclusions rest consists primarily of the computerized data base used by the North Carolina Legislature to draw the boundaries of districts under challenge in this lawsuit. This file permitted me to determine, precinct by precinct,

a. the number of residents therein by racial category, according to the 1990 US census,

b. the number of voting age residents therein by racial category, according to the 1990 US census,

c. the number of registered voters therein, by racial category, according to local voter registration records,

d. the number of people who voted for each major candidate in the 1988 Court of Appeals election,

e. the number of people who voted for each major candidate in the 1988 Lieutenant Governor election,

f. the number of people who voted for each major candidate in the 1990 Helms - Gantt US Senatorial election, and

g. the number of registered voters by political affiliation.[1]

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[1] In 69 of the State's 100 counties, these counts can be inferred for each precinct within the county. For the remaining 31 counties, precinct level information is not available so we used Minor Civil Divisions instead. Of the nine counties touching or included in the Twelfth District, only Davie County is among the 31 counties not having precinct level information.

I also relied on numerous maps of North Carolina supplied to me by the State, showing the boundaries of the Districts and the identities of the precincts bordering them.

Analysis: Correlation of Race with Party Affiliation

5. Using the data file described above, I calculated for each of the North Carolina precincts the following seven percentages:

a. the percentage of the resident population who are black,[2]

b. the percentage of the voting age population who are black,

c. the percentage of the registered voters who are black,

d. the percentage of the voters who voted for the Democratic candidate in the 1988 Court of Appeals election,

e. the percentage of the voters who voted for the Democratic candidate in the 1988 Lieutenant Governor election,

f. the percentage of the voters who voted for the Democratic candidate in the 1990 Helms - Gantt US Senate election, and

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[2] Nearly all of the racial minority people living in the vicinity of the Twelfth District are black. I have repeated all of the analyses described in this affidavit using all minorities in lieu of blacks, and the results are identical in all material respects.

g. the percentage of the voters who are registered as Democrats.[3]

6. I then plotted each of the State's 2217 precincts on a graph, based on its registered voter black percentage (5c above) and its registered voter Democratic percentage (5g above). The result is Chart 1. This chart, which looks like an inverted tornado, displays a strong correlation between racial composition and party preference. It shows that in precincts with high black representation, there is a correspondingly high tendency for voters to favor the Democratic Party. In precincts with low black representation, there is much more variation in party preference, and the fraction of registered voters favoring Democrats is substantially lower.

7. Virtually the same picture emerges when one includes in Chart 1 just the six counties through which District Twelve runs; and the picture is again much the same when one includes just the nine counties touched by the Twelfth District.[4] This collection of charts is the basis for my conclusion that there is a substantial correlation between the black representation within a precinct and the proportion of its residents who favor the Democratic Party.

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[3] In calculating each of these four party affiliation percentages, I included only people who were identified with one of the two major parties. Hence, a precinct that by one of these measures is "42% Democratic," it is in the same sense "58% Republican."

[4] I have created analogous charts using the other measures of racial composition and party affiliation defined in paragraph 5, and they too do not differ materially from Chart 1.

Analysis: Correlation of Boundary with Race and Political Party

8. The basic geographic unit used by the legislature in constructing districts is the precinct. (There are some instances in which county boundaries are used, but even these are also precinct boundaries.) To examine the correlation of the Twelfth District boundary with the race of people living along its path, I identified each of the precincts that touch the boundary, and divided the boundary into segments each of which separates one precinct inside the District from the one just outside. There are 234 such segments, each of which reflects a decision made by the legislature about the path taken by the Twelfth District border.[5] For each segment, I then determined whether the representation of blacks is greater in the inside precinct than it is in the outside precinct, using each of the three measures 5a, 5b and 5c.

9. If, for each segment, the representation of blacks were greater in the inside precinct than the outside precinct, then the correlation between the path taken by the border and the racial makeup of the precincts around which it travels would be perfect. On the other hand, were only half of the segments of this type, there would be no correlation at all between the path taken by the border and the racial composition

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[5] Among the border precincts, three have no registered voters. These precincts touch five boundary segments, which are necessarily excluded from correlation calculations based on measures 5c through 5g.

of the precincts it separates.[6] The actual results fall about halfway between these extremes, as follows:

Black Population (5a)	79.1%
Black Voting Age Population (5b)	79.9%
Black Registered Voters (5c)	79.5%

10. It is evident from these figures that there is some positive correlation between the path taken by the border of the Twelfth District and the racial composition of the local residents. It is also clear that the correlation is not perfect.

11. Similarly, I noted for each of the 234 segments constituting the border of the Twelfth District whether the representation of Democrats was greater in the inside precinct than in the outside precinct. If 100% of the segments had this property, the border would correlate perfectly with party preference, while if only half had the property, there would be no correlation at all. The actual results, for each of the four party preference measures, are midway between these extremes, as follows:

1988 Court of Appeals Election (5d)	80.8%
1988 Lt Governor Election (5e)	78.6%
1990 Helms - Gantt Election (5f)	80.8%
Registered Voters (5g)	84.3%

12. Evidently, there is some positive correlation between the path taken by the border of the Twelfth District and the party preferences of the local residents, though the correlation is not perfect.

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[6] If none (0%) of the segments had this property, there would once again be perfect correlation between the boundary line and the racial makeup along its path, but in the sense that the boundary tends to exclude blacks from the Twelfth District.

13. Comparing the numerical results from paragraphs 9 and 11 above, it is apparent that there is at least as much correlation between the border of the Twelfth District and the party preferences of the local residents as there is between the border and the racial composition of those residents. That is, the statistical evidence supporting party affiliation as an important determinant of the boundary is at least as strong, and marginally stronger, than the statistical evidence supporting race as an important determinant of the boundary of the Twelfth District.

Analysis: Divergent Boundary Segments

14. As might be expected from the correlation (paragraphs 6 and 7 above) between party affiliation and racial composition within precincts, there are many District Twelve border segments in which not only is the representation of blacks higher in the inside precinct than in the outside, so too is the representation of people favoring the Democratic Party. Such segments (which I call "convergent") support equally the proposition that

a. the motivation for the District Twelve boundary was at least in part to maximize black representation within the District (the "Race Hypothesis"),

and the proposition that

b. the motivation was at least in part the maximization of Democratic Party affiliation (the "Political Hypothesis").

Clearly, convergent segments do not help us determine which of these two propositions is more likely.

15. There is a second type of convergent segment, namely a border segment for which the representation of blacks is greater in the outside precinct than in the inside and for which the representation of Democrats is also greater outside than inside. For the same reason noted above, this type of convergent segment also tells us nothing about which of the two aforementioned propositions is the more likely.

16. Only the boundary segments which are divergent, *i.e.*, those for which

a. the representation of blacks on the inside is greater than that on the outside and for which the representation of Democrats is greater on the outside than on the inside ("Type R" boundary segments),

or, alternatively, for which

b. the representation of blacks on the outside is greater and the representation of Democrats on the inside is greater ("Type P" boundary segments),

can indicate which of the above two propositions is more likely.

17. Evidently, a Type R divergent boundary segment favors the Race Hypothesis over the Political Hypothesis, while a Type P segment favors the Political Hypothesis over the Race Hypothesis.

18. Depending on the measures used to determine racial representation and Democratic party preference, a given boundary segment may or may not be divergent. I have examined all possible combinations of the three racial measures (5a, 5b and 5c) and the four party preference measures (5d, 5e, 5f and 5g), resulting in twelve different ways to determine whether a boundary segment is divergent.

For example, using the two measures (5c and 5g) based on registered voters, there are 41 divergent boundary segments. Of these, 26 are of Type P, namely ones for which the representation of blacks is greater on the outside than on the inside, yet the representation of Democrats is greater on the inside than on the outside. The remaining 15 divergent segments are of Type R: the representation of blacks is greater on the inside than on the outside, yet the representation of Democrats is greater on the outside. Evidently, the balance here tips in favor of the Political Hypothesis by a score of 26 divergent segments to 15: it is more likely that of the two propositions, party affiliation was the driving force rather than race.

19. Of the total of twelve such analyses,

a. seven result in a pattern of divergent boundary segments favoring the Political Hypothesis over the Race Hypothesis, in the sense just described,

b. three result in a pattern favoring the Race Hypothesis over the Political Hypothesis, and

c. two result in a pattern equally strong in support of both hypotheses.

It is clear from these analyses that the statistical support for the Political Hypothesis is at least as strong as that for the Race Hypothesis, and, indeed, somewhat stronger.

20. As indicated above, some boundary segments are divergent when judged by one pair of measures of race and party preference, but not divergent when judged by another. There are, however, ten boundary segments that are divergent by every one of the twelve combinations of race and party affiliation measures. Of these ten unequivocally divergent boundary segments,

a. six support the Political Hypothesis, while
b. four support the Race Hypothesis.

Again, the statistical support for the Political Hypothesis is at least as strong as that for the Race Hypothesis, and indeed, slightly stronger.

21. Finally, the representation of blacks in the Twelfth District by each of the three measures used herein is:

Black Population (5a)	47%
Black Voting Age Population (5b)	43%
Black Registered Voters (5c)	46%

By none of these measures do blacks constitute a majority of the people in the Twelfth District. Similarly, the representation of Democrats in the Twelfth District by each of the four measures used herein is:

1988 Court of Appeals Election (5d)	62%
1988 Lt Governor Election (5e)	62%
1990 Helms - Gantt Election (5f)	66%
Registered Voters (5g)	75%

By every one of these measures, Democrats constitute a majority of the people in the Twelfth District. These figures

support the proposition that creation of a Democratic majority in District Twelve was a more important consideration in its construction than was the creation of a black majority.

Further the Affiant Saith Naught.

/s/ David W. Peterson, PhD

Subscribed and sworn to before me
this 27th day of February, 1998.

/s/ Peter R. Shalak
Notary Public

My Commission Expires: 1-16-2002

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SECOND AFFIDAVIT OF DAVID W. PETERSON, PHD (WITHOUT TABLE AND CHARTS) (EXHIBITS 20)

[Caption Omitted in Printing]

SECOND AFFIDAVIT OF DAVID W. PETERSON, PHD

DAVID W. PETERSON, PHD, being duly sworn, deposes and declares the following:

Identity

1. As indicated in my first affidavit, I am president of PRI Associates, Incorporated, a company whose chief activity is providing statistical litigation support. I am also a retired statistics professor. Further detail about my qualifications is set forth in my first affidavit, and in the resume attached to this affidavit.

Assignment

2. I am retained in this matter by the defendant to respond to and comment on several issues raised by plaintiffs and their experts. In particular, these issues are

   a. Whether the conclusions reached by Dr. Ronald E. Weber in his declaration follow logically from his analysis;

   b. How the precincts that plaintiffs suggest could or should have been included in the Twelfth District compare with those that in fact were included with respect to the political preferences of their inhabitants; and

c. How the percentage[1] of people registered as Democrats in a precinct tends to differ from the percentages of people who have voted for Democratic candidates.

Conclusions

3. For reasons set forth below, it is my opinion that

a. Dr. Weber's conclusions (i) that "race was the predominant factor" in the construction of North Carolina 1997 Senate Plan A, and (ii) that "race-neutral traditional districting principles" were subordinated "to racial considerations" do not follow from his analysis;

b. The precincts included in the Twelfth District generally had a greater percentage of Democratic voters than those which plaintiffs suggest should or could have been included instead; and

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[1] All of the percentages alluded to in this report are based, as is customary throughout this case, on voters who are either Republican or Democratic; people who are neither are excluded from the calculation. As a result, if, for example, 35% of a precinct's voters are considered Republican, then necessarily 100% - 35% = 65% are considered Democratic.

c. The fraction of people in a precinct who are registered Democrats generally exceeds the percentage of people in that precinct who vote for Democratic candidates.

Underlying Data

4. In reaching the above conclusions, I rely on Dr. Weber's March 1998 Declaration in this matter, the Affidavit of Martin B. McGee (especially Exhibits A - I), Plaintiffs' Brief (especially pp. 19 - 20), this Court's April 14, 1998 Memorandum Opinion, and the same computerized data base on which my first affidavit is based.

Analysis: Dr. Weber's Declaration

5. Dr. Weber's pattern of reasoning is as follows:

Since

A. within the vicinity of District Twelve, there is a correlation between the racial composition of people living in a precinct and the inclusion of that precinct within the district boundary,

it must be that

B. racial considerations dictated whether a precinct was included in the District.

6. This pattern is illogical, and a fine example of the caution urged in every well-taught elementary statistics course: correlation does not imply causation. One could use Dr.

Weber's line of reasoning to establish that, for example, the widespread eating of turkey causes Thanksgiving to occur.

7. Dr. Weber makes no allowance in his analysis for the possibility that political affiliation, a factor defendant claims as one of its salient considerations, explains the construction of District Twelve as well or better than does the racial pattern of nearby residents. Indeed, one could replicate Dr. Weber's analysis substituting "political preference" for "racial composition" and reach the no less compelling conclusion that political preference was the predominant factor in the drawing of District Twelve, and a factor to which other "districting principles" were subordinate.

Analysis: Nearby Excluded Precincts Containing Democrats

8. In Exhibits A - I of the McGee affidavit, plaintiffs identify nine precincts outside of (but bordering on) District Twelve, a substantial proportion of whose residents are Democrats. Plaintiffs cite these precincts as evidence that "makes clear that race – not politics – was the predominant factor in the creation of this district." (Pl. Br. at 19-20.) The implication apparently is that had defendant truly chosen the border of District Twelve based on political affiliation rather than race, it would surely have included rather than excluded these precincts from District Twelve.

9. We have identified all fourteen of the precincts within District Twelve which touch the above nine precincts, and compared the political composition of the inside precinct

to that of its neighbor outside. In all but six of the 56 comparisons, the precinct inside is "more Democratic" than its outside neighbor. Hence, in the great majority of instances, the boundary of the 12th District serves to fence in Democrats rather than to fence them out.

10. The identities of the nine precincts and of the District Twelve precincts they touch are shown in Table Aff2.1. Successive columns show the amount by which the percentage of Democrats in the inside precinct exceeds the percentage of Democrats in the adjacent precinct outside, by each of four measures. The first such column is based on the percentage of registered voters in each precinct who are Democrats, the second is based on the percentage of the precinct's voters who voted Democratic in the 1988 Lieutenant Governor election. The third and fourth columns are based analogously on election results from the 1988 Court of Appeals election and the 1990 Senatorial election, respectively. As is apparent, the representation of Democrats is higher inside District Twelve than outside in 50 of the 56 comparisons.

Analysis: Relationship of Voter Registration to Voting Pattern

11. To examine the relationship of the percentage of a precinct's registered voters who declare themselves Democrats to the fraction of that precinct's voters who vote for Democratic candidates, I created a scatter plot for each of three elections. In the first, I plotted for each precinct in the state the percentage of its registered voters who are declared Democrats against the percentage of its voters who voted for the

Democratic candidate in the 1988 Court of Appeals election. This scatter plot is attached as Chart 1. Since the vast majority of points in this plot lie above the forty-five degree line radiating from the origin, it is apparent that in nearly all precincts, the proportion of Democrats according to registration exceeds, and in many instances far exceeds, the proportion of people who voted for the Democratic candidate.

12. I repeated this exercise using data from the 1988 Lieutenant Governor election, and obtained the results displayed in Chart 2. Once again, most points lie above the forty-five degree line, and once again it is apparent that the proportion of Democrats according to registration generally exceeds the proportion of people who voted for the Democratic candidate.

13. Chart 3 displays the results that obtain when the 1990 Helms - Gantt US Senate election are used. Again, it is clear that the proportion of Democrats according to registration within a precinct generally exceeds the proportion of people who voted for the Democratic candidate.

14. Charts 4, 5 and 6 show the results analogous to Charts 1, 2 and 3 when attention is limited just to the precincts in the Twelfth District. Again, the result is that the proportion of Democrats according to registration within a precinct generally exceeds the proportion of people who voted for the Democratic candidate.

15. My rate of compensation in this matter is $335 per hour. The cases in which I have testified at trial in the last four years are listed in an attachment hereto, as are the cases in which I have testified at deposition. My publications over the last ten years are listed in the attached resume.

Further the Affiant saith naught.

/s/ David W. Peterson, PhD

I, Alissa K. Chapman, a Notary Public of said State do hereby certify that David W. Peterson personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and notarial seal, this the 8th day of September, 1999.

/s/ Alissa K. Chapman	7/11/2001
Notary Public	My Commission Expires

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DAVID W. PETERSON, PHD, TRIAL TESTIMONY (SELECTED PORTIONS)

[*483] Q. Would you please identify yourself?

A. Yes. My name is David West Peterson.

Q. And could you just give a very brief summary of your **[*484]** qualifications and background?

A. Yes. I'm President of PRI associates, a statistical consulting and software development firm in Durham, North Carolina; recently retired as a faculty member from Duke more than 20 years. I taught first in the business school, later on in the law school and later yet in the statistics department. My area of specialty is statistics. I'm coauthor of a book titled *Use of Statistics in Equal Employment Opportunity Litigation* and co-author of a law review article on the subject of judging science and extended review of a book published by the Federal Judiciary Center. It was published in Washington in the use of scientific evidence in court.

I'm an occasional speaker at seminars for attorneys sponsored by the American Bar Association and other organizations. I'm a member of the faculty of a seminar put on annually at Duke University on the subject of judging science. The clientele there are not practicing attorneys, but judges.

Q. Could you elaborate what you are teaching the judges?

A. Basically, what we're trying to do is teach them the difference between good science and what might be called nonscience.

Q. What portion of that program were you responsible for?

[*485] A. I'm responsible for the initial portion where we talk about what ideal scientific study is and compare it with a study which is far from ideal and point out what the differences are and why one is probative and the other is not.

Q. And what kind of judges attend this seminar?

A. Mostly state level judges, but we draw judges from all across the country. We draw an occasional federal district judge and an occasional federal circuit judge. Chief Justice Henry Frey of the North Carolina Supreme Court is one of our recent graduates and we recently took the show on the road, so to speak, down to Florida and put on the program there for the State Appellate Court judges, including several from the State Supreme Court.

Q. And attached to your second affidavit, which is Exhibit 20, is there a full resume and list of your articles and publications and background?

A. Yes.

Q. All right. Dr. Peterson, briefly, just what was your assignment?

A. My assignment in this case was to see to what extent there was statistical evidence in support of the proposition that race was the predominate factor in the drawing of the boundary of the 12th District.

Q. What was your analysis?

[*486] A. It was based on the following line of thought. If the boundary of the 12th District were drawn with the purpose of collecting blacks inside of it, one would expect as one travels along the boundary to find consistently that blacks are more heavily represented inside the boundary than outside. In contrast, if the boundary were drawn with the purpose of collecting Democrats into the 12th District, one would expect as one travels along the boundary to find consistently that Democrats are more heavily represented inside the boundary than outside.

The situation can be likened to that of a contour line on a contour map. A contour line is drawn for the purpose of providing one with a level path. As one walks along a contour line, one has neither to climb nor descend consistently on one side of the line. The land is higher than it is on the other side.

We might suppose that we're given a boundary down on the map such as the boundary of the 12th District and ask to determine empirically whether it's a contour line. One test of that would be to travel along the line and see whether consistently the land is higher on one side of the line than it is on the other.

And if it turns out that that turns out to be the case, that's evidence in support of the proposition that **[*487]** the purpose for drawing the line was to make it a contour line. Likewise, if the purpose for drawing the line was to collect blacks into the 12th District, one would expect that walking along the line one would see a consistent pattern in which blacks were more heavily represente inside than outside. Likewise, if the purpose for drawing the line was to collect Democrats within the 12th District, traverse of the line should reveal that most of the time Democrats are represented more heavily inside than out.

What I found in my study traversing the boundary of the 12th District is that most of the time blacks are represented more heavily inside the line than out, about 80 percent of the time. I also found that Democrats are represented more heavily inside than out, also about 80 percent of the time. And so the evidence is equally supportive of both hypothesis, that is to say the two are statistically indistinguishable. In particular, neither one dominates the other.

It is true that the party affiliation association is slightly stronger than the racial affiliation association, but it is not significantly, that is to say statistically significantly stronger. I can not conclude that the party -- that the evidence in favor of the party theory is statistically significantly stronger than it is in favor **[*488]** of the race theory.

Q. Would the converse hold for the race theory?

A. That's right. Neither race nor party dominates statistically.

Q. Okay. Could you briefly tell the Court, in very summary form, perhaps using some of your exhibits, what your analyses were?

A. Sure. I have described what I characterize as my main study and maybe the exhibit that best exemplifies the conclusions not only of that study but also of a couple of other studies that I did is an Exhibit numbered 428, which consists of a collection of pie charts.

Q. If you will allow the Judges a moment.

A. Sure. And I point particularly to Chart Number 8 in that collection.

Q. The full details of this one are in your first, second and third affidavit?

A. That's right, primarily the first. The chart that we're looking for is the one that looks like this, Chart Number 8.

Q. Exhibit 428?

A. In Exhibit 428. And this is a collection of 12 pie charts that summarize 12 variations on the second of three studies that I did. But the results that were apparent here typify the results of all of the studies that I have **[*489]** done.

In interpreting a pie chart here, the more heavily the

darker portion of each pie represents the strength of evidence in support of the race hypothesis, the hypothesis that race was an important factor in the drawing of the predominate boundary of the 12th District. The light gray areas indicates the strength of statistical report for party affiliation. That party affiliation was an important factor in drawing the boundary.

In looking across these charts, there's a pretty even split. The support for the one hypothesis, about as strong as the support for the other that's in all of my studies. If you get in and count closely, you will see that support is slightly stronger in favor of the party hypothesis overall than it is for the race hypothesis, but not statistically significantly stronger.

Q. And what did you -- what did you determine -- excuse me. You did three studies?

A. Yes.

Q. What was the result of the first study?

A. The result of the first study was that about 80 percent of the time going around the boundary, blacks are more heavily represented inside than out and about the same can be said for Democrats.

Q. And was that using convergent segments?

[*490] A. That was using all segments, 100 percent of the segments, all of the segments for which we had data.

Q. Did you do additional studies?

A. Yes, I did one study focused on what I call divergent segments in the Exhibit that we were just looking at. There's reference in the title to divergent segments, so this is a summary of the second study based on divergent second segments.

Q. Did you do a third study?

A. Did a third study based on segments unequivocally based on divergent, that is by all measures they were divergent.

Q. Did you determine the results of those studies?

A. The same thing. The balance is about equal between the two. Summary of that one is shown in the next exhibit -- or Chart 9 of Exhibit 428.

* * *

[*494] Q. Okay. Now, I believe you have looked at Dr. Weber's statistical tables and you yourself ran a study based on his Table Two in his Exhibit 47?

A. Yes, that's true.

Q. Okay. Could you tell the Court what you did and perhaps show them your exhibit?

[*495] A. Sure.

Q. I believe it's Exhibit 433?

A. Yes, thank you. I don't have a copy of Dr. Weber's Table Two here, but referring to Exhibit 433, I recall that Dr. Weber's Table Two identified all of the counties that were split in the formation of not only the 12th District but other districts as well, including the First. And the point that he makes in looking at his Table Two is that consistently the portion of the county that's included in the 12th District in a split contains blacks to a greater extent than the county -- than the portions of the county not included in the 12th District. And he makes a similar finding with respect to the First District. What I did was to ask essentially the same question, but with respect to party affiliation rather than racial identity.

What I find is that consistently the portion of split counties that are included in the 12th District contain Democrats to a greater extent than the portions of the counties that were not included in the 12th District, and that's what's reflected on the first page of Exhibit 433. So if I were to follow Dr. Weber's pattern of analysis, I would conclude, based on the first page of Exhibit 433, that party affiliation must have been the predominate factor in the drawing of the boundary of the 12th **[*496]** District.

Q. What about page two?

A. Page two is an analogous portion of Dr. Weber's Table Two, also based on party affiliation but this time pertaining to the 1st District. And once again, when you split by party affiliation rather than by race, you find that by and large it's the portions of the counties in which Democrats are more heavily represented that are included in the 1st District than the portions of the counties that are excluded.

There's an exception that has to be made for Beaufort, because Beaufort is a county like Davie County, a county in which precinct data are not available and the voter information for Beaufort County, as represented in the state, is really meaningless. You can see there's tiny differences in the portions included and excluded. Those are of no material consequence. We should probably scratch Beaufort off of this Exhibit.

Having done that, if I follow Dr. Weber's pattern and thought I would have to conclude from this part of Table Two that party affiliation was the predominate factors in the drawing of the boundaries in the 1st District.

Q. Did you do similar analysis with respect to Table Four?

A. Yes, I did.

[*497] Q. Which I believe is splitting municipalities in places?

A. Yes. The results of that are shown in Exhibit 434. Once again, I split -- noted what the party affiliations are of each of the split pieces and noted that in virtually every sense it's the more heavily Democratic portion of the split geographic unit included in the 12th District.

So once again, following Dr. Weber's pattern of thought, I would be forced to the conclusion that party affiliation must have been the predominate factor in the drawing of the boundaries of the 12th District. And on the second page of Exhibit 434 is the analogous analysis for the 1st District. Once again, party affiliation is shown here.

Again, consistently it's the portions of the municipalities with the higher representations of Democrats included in the 1st District, if I follow Dr. Weber. Again, I would have to conclude that party affiliation was the factor predominate in the drawing of the First District.

Q. Dr. Peterson, Dr. Weber testified yesterday. He looked at your chart and he compared it and said, well, you notice that if you look at my tables that the gap in the racial percentage is greater than the gap in your **[*498]** political percentage?

A. Yes.

Q. Could you comment on that?

A. Oh, sure. Those percentages are measured on two completely different scales and the problem is essentially this: most of the precincts in North Carolina and in the vicinity of the 12th District contain Democrats in the percentages of 40 to 60 percent. Relatively few precincts contain blacks in the percentage of 40 to 60 percent. Most precincts are either heavily black or heavily white. Most precincts are within a

60/40 mix of being Republican and Democrat.

As you move around North Carolina, you will find much wider representations in the racial mix than you will find in the political mix of the population. So those percentages are simply measured on two different scales. One can't compare directly a difference between racial percentages and a difference between party affiliation percentages. They are not just comparable.

* * *

[*500] A. There are three things wrong with Dr. Weber's Table 6. The first is that an underlying predicate is that within a county all of the precincts are freely interchangeable in the following sense. That any collection of the precincts in that county could as well be included in the 12th District as any other regardless of the geographic location of those precincts. That's a fault that underlies not only as Table Six, but as Table 1, Table 2, Table 3, Table 4 and Table 5. Of course, that's an unrealistic supposition.

The second thing that's wrong with Dr. Weber's Table 6, is that it's incomplete. It applies only to precincts in which there are a majority of Democrats. And in my Exhibit 435, I have completed Dr. Weber's table to show additionally what the situation is with respect to all of the other precincts.

Q. If I might stop you right here, Dr. Peterson. I think for the Court to understand what you mean by complete, that they need to turn to Exhibit 47.

A. Okay.

Q. Table 6. I apologize, that's in another notebook.

Now, could you explain. Before when you say the table is not complete, could you -- and do you need a copy of Table 6?

[*501] A. I have it in mind, but I don't have a copy in front of me.

Ms. Smiley: Excuse me while I approach the witness.

Q. Now, what do you mean by the table is "not complete"?

A. If we look at the first page, page 56, we see the column headings indicate percent Democratic registration in the range of 50 to 59.9 percent and then 60 to 69.9 percent and greater than 70 percent. But there's no play place in the table for precincts in which the percent Democratic registration is less than 50 percent. So what I have done in Exhibit 435 is to provide the information on the other precincts.

Q. So you have completed the table?

A. So I completed the table, yes.

Q. Could you tell the Court what you conclude in this table?

A. Yes. This is the third point that's troubling about the Table 6, and that is when you complete Table 6 and examine it closely, what you find is that support is about equal even in Table 6 for the party hypothesis and for the racial hypothesis. And I can demonstrate that with the use of just a little analysis of the first page of Exhibit 435 if the Court would care to see it?

* * *

[*506] We tally up the numbers here, see how many R's we have, how many P's we've got. You see we have five P's and two R's. It's evident that there is more support here for the party affiliation hypothesis than there is for the race hypothesis. What may not be so apparent is those two differences are not statistically significant. There were not enough instances of comparison to say the party hypothesis dominates the race hypothesis. It's clear the race hypothesis does not dominate the party affiliation **[*507]** hypothesis. We could do the same thing with the other tables, and what we would find is essentially the same result.

Q. Dr. Peterson, could you give us, after your various studies and your reviews of Dr. Weber's studies, could you give us your bottom line conclusion?

A. Sure. The statistical evidence is almost vocal [*sic*] in its support of the race hypothesis and party affiliation hypothesis. The two are statistically indistinguishable, but of the two hypotheses, the statistical evidence supports the party affiliation hypothesis marginally better than it supports the race hypothesis.

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PERCENT DEMOCRAT IN SPLIT COUNTIES BY COUNTY

Percent Democrat in Split Counties
by County for 1997 Congressional Districting Plan

COUNTIES SPLIT BY 12TH DISTRICT

Analagous to Dr. Weber's Table 2

County	Dis	% Dem Reg Voters	% Dem 1988 Lt Gov	% Dem 1988 COA	% Dem 1990 US Sen
Davidson	12	**55.57***	**40.90***	**40.29***	**36.89***
Davidson	6	51.94	39.05	38.07	30.41
Forsyth	12	**88.08***	**78.65***	**81.31***	**82.76***
Forsyth	5	55.88	42.62	41.22	40.19
Guilford	12	**78.69***	**68.72***	**67.39***	**68.84***
Guilford	6	56.59	45.67	39.38	43.27
Iredell	12	**65.83***	**45.71***	**44.90***	**49.05***
Iredell	10	59.67	37.03	39.47	36.37
Mecklenburg	12	**77.73***	**65.66***	**65.25***	**74.74***
Mecklenburg	9	48.29	39.06	31.07	48.17
Rowan	12	**68.09***	**57.34***	**56.78***	**54.00***
Rowan	6	50.68	38.73	35.99	32.25

Percent Democrat in Split Counties by County for 1997 Congressional Districting Plan

COUNTIES SPLIT BY 1ST DISTRICT

Analagous to Dr. Weber's Table 2

County	Dis	% Dem Reg Voters	% Dem 1988 Lt Gov	% Dem 1988 COA	% Dem 1990 US Sen
Beaufort	1	**76.78***	**48.48***	54.61	38.80
Beaufort	3	76.62	48.44	**54.71***	**39.01***
Craven	1	**81.40***	**57.38***	**63.47***	**56.67***
Craven	3	64.66	41.68	45.82	40.90
Granville	1	**92.28***	**64.44***	**73.77***	**54.09***
Granville	2	82.61	50.35	59.12	42.35
Jones	1	**91.99***	**62.38***	**67.85***	**49.93***
Jones	3	84.91	43.73	54.35	30.10
Lenoir	1	**86.89***	**65.24***	**72.56***	**57.95***
Lenoir	3	74.39	35.12	46.34	20.06
Person	1	**87.64***	**52.52***	**60.73***	**40.82***
Person	4	82.53	45.06	51.42	30.09
Pitt	1	**83.13***	**59.25***	**69.00***	**56.30***
Pitt	3	71.23	46.98	59.15	46.10
Washington	1	90.46	**63.59***	**69.85***	**48.42***
Washington	3	**92.22***	56.59	61.75	44.84
Wayne	1	**82.61***	**57.32***	**62.31***	**50.81***
Wayne	3	71.79	38.13	42.56	28.06
Wilson	1	**83.72***	**59.65***	**65.85***	**55.67***
Wilson	2	72.96	39.05	47.73	28.51

Percent Democrat in Split Municipalities and Census Designated Places by City or Town for 1997 Plan

PLACES SPLIT BY THE 12TH DISTRICT

Analagous to Dr. Weber's Table 4

City/Town	Dis	% Dem Reg Voters	% Dem 1988 Lt Gov	% Dem 1988 COA	% Dem 1990 US Sen
Charlotte	12	**80.91***	**69.52***	**69.19***	**78.44***
Charlotte	9	48.39	39.78	31.49	50.41
Cornelius	12	**63.07***	**43.45***	**42.00***	**48.73***
Cornelius	9	48.00	34.81	26.72	42.75
Davidson	12	69.54	55.58	48.66	67.61
Davidson	10				
Greensboro	12	**81.79***	**73.00***	**72.58***	**73.55***
Greensboro	6	59.63	51.79	43.05	53.49
High Point	12	**76.65***	**63.31***	**63.41***	**63.35***
High Point	5	33.33	33.33	50.00	33.33
High Point	6	50.26	38.58	34.14	36.22
Lexington	12	**76.93***	60.32	**60.69***	**62.00***
Lexington	6	71.88	**60.36***	60.56	50.71
Mooresville	12	62.69	43.69	44.14	44.36
Mooresville	10				
Salisbury	12	**67.18***	**58.75***	**60.87***	**50.28***
Salisbury	6	59.55	46.98	46.58	44.86
Spencer	12	**75.40***	**58.85***	**57.85***	**57.07***
Spencer	6	60.00	50.00	50.00	50.00
Statesville	12	**80.59***	**64.26***	**53.64***	**69.80***
Statesville	10	63.61	40.28	42.80	42.05
Thomasville	12	**68.00***	**58.03***	**58.00***	**56.95***
Thomasville	6	54.92	41.46	39.63	30.82

Troutman	12	**64.00***	**42.11***	**44.44***	**40.00***
Troutman	10	61.79	34.84	37.52	38.16
WinstonSalem	12	**90.41***	**82.22***	**85.21***	**86.33***
WinstonSalem	5	61.02	49.22	46.87	49.40

Percent Democrat in Split Muncipalities and Census Designated Places by City or Town for 1997 Plan

PLACES SPLIT BY 1ST DISTRICT

Analagous to Dr. Weber's Table 4

City/Town	Dis	% Dem Reg Voters	% Dem 1988 Lt Gov	% Dem 1988 COA	% Dem 1990 US Sen
Ayden	1	**82.03***	**53.89***	65.07	45.97
Ayden	3	80.26	51.85	**66.67***	**46.00***
Battleboro	1	**90.23***	**72.86***	**80.60***	**69.14***
Battleboro	2	82.28	59.18	69.77	56.25
Fremont	1	**89.24***	**59.66***	**66.24***	**52.24***
Fremont	3	72.73	28.57	33.33	13.33
Goldsboro	1	**84.45***	**61.83***	**66.34***	**56.77***
Goldsboro	3	65.99	33.78	36.94	24.06
Greenville	1	**83.70***	**68.73***	**76.29***	**74.61***
Greenville	3	65.20	46.07	56.25	52.43
Kinston	1	**91.08***	**78.46***	**83.37***	**75.06***
Kinston	3	73.82	36.60	46.75	25.35
New Bern	1	**80.85***	**59.17***	**65.18***	**58.23***
New Bern	3	65.27	46.53	52.78	45.95
RockyMount	1	**93.33***	**80.54***	**85.12***	**85.17***
RockyMount	2	66.45	37.82	44.38	35.68
Sharpsburg	1	**77.60***	**48.51***	**55.56***	**39.25***
Sharpsburg	2	61.28	28.73	35.63	17.76
Trent Woods	1	**76.26***	**49.67***	**53.19***	**61.54***
Trent Woods	3	66.38	38.36	47.24	35.04
Washington	1	76.93	48.38	54.70	38.60
Washington	3				

Whitakers	1	**91.28***	**69.91***	**79.81***	**65.41***
Whitakers	2	88.17	66.38	70.91	61.98
Wilson	1	**86.46***	**67.68***	**72.69***	**67.30***
Wilson	2	69.48	38.10	46.95	28.12

GERRY COHEN, TRIAL TESTIMONY (SELECTED PORTIONS)

[*523] Q. Do you recall on or about February 10, 1997, writing a memorandum to an e-mail -- I should say to Leslie Winner and to Roy Cooper?

A. Yes. I probably wrote several e-mails to them. Are you asking about this one in particular?

Q. Yes, I'm referring now to what's Exhibit 58. With respect to that document, that e-mail, do you recall sending such an e-mail on or about February 10, 1997?

[*524] A. Yes, I do.

Q. And in that context, in the last sentence or the last two lines, there is a reference to the Greensboro black community?

A. Yes, sir.

Q. What were you referring to as the "Greensboro black community" when you wrote that memorandum?

A. Well, Senator Cooper had earlier that day or the previous day told me to draw a new plan which would eliminate the problem in the prior plan that Guilford County was in three Congressional Districts, which he said was not acceptable. And there needed to be no county more than two congressional districts in the state. He asked me to make changes in the plan to have Guilford only in two congressional districts. My basic instruction was to include more of the 12th District -- excuse me, more of Guilford County in the 12th District for several different factors.

And the first thing I did was extend all the way up into Greensboro including, I think, most of two State House Districts and this was actually one sentence at the end of a longer memorandum that really talked about the First Congressional District. And by mentioning the Greensboro black community, I talked about the basic part of a larger group in the precincts that I moved in. I **[*525]** think I moved 27 precincts in at that time of which the Greensboro black community was about 11 of those 27.

Q. All right. Now, with respect to Guilford County, was any part of Guilford County already in the plan you were developing?

A. Yes. The plan that I was working from at that point had, I think, ten or 11 precincts in High Point; the Guilford County part of High Point in the 12th District already.

Q. Do you recall whether those precincts were predominately African American?

A. I think that five of the nine or ten in High Point at that time were predominately African American in the plan I had been working from at that point. I'm not sure of the exact numbers.

Q. Was that number either decreased or increased at a later time?

A. I believe that when -- the 27 precincts that I moved in that it was referring to in this memo, at least one of them was in High Point, but it was predominately white.

Q. Do you recall approximately the number of African Americans that were in Guilford County at the time of the plan immediately preceding the one that you drew and referred to in that memorandum?

A. I don't recall that number.

[*526] Q. All right. I'm going to show you this map, which purports to indicate racial concentrations in the 1997 Plan?

A. Okay.

Q. I'm going to ask you whether, with respect to Greensboro, whether or not the area that is indicated with red, red checks

there, is the Greensboro black community includes the Greensboro black community that you were referring to in your memorandum?

A. Your key there shows those red precincts, shows those being 40 percent or higher black in terms of total population, so I think that certainly is the same sort of -- the red coloring is the same shorthand that I used at the time I talked about the black community in Greensboro.

Q. Do you recall how many African Americans in Guilford County were included in the plan that you submitted at that time?

A. I know the number that I added between the previous plan, which was called '97 Cooper 2.0 and the resulting Cooper 3.0, that I mentioned in this memo, I recall the total number of people moved and the racial composition, but I don't recall what had been previously and I don't remember the total.

Q. What was the percentage of those you moved as far as **[*527]** race was concerned?

A. I think the total number actually moved, I went back and looked at that after the deposition, was about 108,000 of which about 52,000 were black.

Q. All right. And with respect to the moving the 52,000 black, were they moved in or moved out -- let me rephrase that. You mean a hundred some thousand were moved into the district as a result of this plan?

A. Yes. There were about 102,000 plus population in Guilford County moved from the 6th District to the 12th or from the 5th District to the 12th, because it had been in three different districts at the time.

* * *

[*530] Q. Just with a view to pointing out in the first two lines, you are referring to a change and could you indicate what that change was and what the purpose of the change was?

A. I mention the changes were in Beaufort, Pitt, Craven and Jones Counties. Do you want me to read the sentence?

Q. That will be fine.

A. By shifting areas in Beaufort, Pitt, Craven and Jones County, I was able to boost the minority percentages in the First District from 48.1 to 49.25.

* * *

[*531] Q. In the next paragraph you use the word "improve" on two occasions, I believe. Improving the percentage. What do you have in mind there?

A. Well, in the sentence I mentioned this was all the district could be improved by switching between the First and Third, unless I wanted to go to Pasquotank, Perquimons or Camden. There since the instructions at that point were to increase the percentage of minority in the district, improvement moving towards that goal, which means increasing the number.

Q. So improve is synonymous with increase African Americans in this particular numbering?

A. Yes, sir.

Q. Was that based on the premise that you had to have a majority black in the First District?

Ms. Smiley: Objection to foundation.

Judge Thornburg: I'll let the witness answer to what he had in mind. That's what we're trying to get at here.

A. Could you restate the question?

Q. Indicate what you had in mind then with respect to **[*532]** achieving a majority black precinct -- majority black district, I mean.

A. The understanding that I received from Senator Cooper was that in order for the plan to pass and in order for what he thought was to perceive approval from the Justice Department along with a bunch of other factors, it was going to need to be more than 50 percent in terms of total population. So that's where we were moving along that track towards.

Q. So your instructions were to create a district with at least 50 percent?

A. I'm not sure right at the point of this memo it was to get it to 50, but I know I was told to make it higher at that point.

Q. It was 49 percent at that point?

A. Yes, sir.

* * *

[*538] Q. Let me ask you one question: Mr. Cohen, have you had an opportunity to look at your Exhibit with the changes and also compare it to Weber's Exhibit 47, Table 5?

A. Yes, I examined both of those against each other.

Q. How many precincts were moved when Greensboro was added to District 12?

A. 29.

[*539] Q. Of those precincts, how many were majority white?

A. 18.

Q. One last question, I hope last question: Do you know about why the Greensboro precincts were added to District 12, this particular move we were talking about?

A. So as to not have Guilford County divided into three districts and so as not to waste Democratic votes in the 6th District since that had been designed as a Republican District. Instead use them to improve the Democratic vote in the 12th District.

Q. What's the source of your information -- that's your belief that that's why they were moved?

A. Yes.

Q. And why do you believe that?

A. Conversations with Senator Cooper at the time the instructions were given.

Q. So he did not give you an instruction to move the black community into District 12?

A. No, he instructed me to move more Guilford County precincts that were predominately Democratic into District 12.

Q. And for the reasons you just stated?

A. Yes, ma'am.

DEFENDANTS' RESPONSE TO PLAINTIFFS' FIRST SET OF INTERROGATORIES (SELECTED PORTIONS)

[Caption Omitted in Printing]

INTERROGATORIES

12. Identify when, by whom, and under what circumstances lines in the 1997 plan were first proposed or thereafter modified for congressional district boundaries that in the 1997 plan split any of these counties, in the manner the county was ultimately split in the 1997 plan: Washington, Beaufort, Craven, Pitt, Wayne, Lenoir, Jones, Mecklenburg, Iredell, Rowan, Davidson, Forsyth, Person, Granville, Wilson and Guilford.

OBJECTION: Defendants object to this interrogatory on the grounds it is overbroad and unduly burdensome in that Gerry Cohen and Linwood Jones, the 1997 Plan drafters, worked on about 200 plans from 1993 through 1997, during which time the lines in different counties were split for a variety of reasons including, but not limited to, partisan considerations, incumbency protection, compactness considerations, geographic and aesthetic considerations, population deviation, and Section 2 considerations. Notwithstanding and without waiving these objections, defendants make the following response.

RESPONSE: Neither Gerry Cohen nor Linwood Jones remembers the precise map that was used to create what eventually became 1997 Congressional Plan A (Cooper's

Senate plan) or House 97 Congressional Plan A.1 (McMahan's House plan). Some of the major line changes that can be recalled at this time include the following.

With regard to the House, the first plan released by the House (Plan A.1) and several other plans that followed Plan A.1 and that were used in negotiations with the Senate did not divide Iredell County. District 12 went through Cabarrus instead of Iredell. By the time the House got to House Plan G (the one the House redistricting committee introduced as a committee bill), Cabarrus was back together and Iredell was split. Concerns raised by the Cabarrus delegation about dividing their county was one factor in switching back to Iredell. Iredell also was part of the core of Representative Watt's then existing district. Forsyth County was not originally divided in the House plans in part to reduce the number of divided counties and also as a potential bargaining chip with the Senate. The House fairly quickly moved to the Senate proposal regarding Forsyth because putting Forsyth Democrats into District 12 helped ensure District 5 was more Republican.

In the plan the House Rules Committee prepared in 1996, Iredell is split between Districts 8 and 10, and District 12 ran from Charlotte to Fayetteville, with both cities split. Guilford, Davidson and Rowan were not divided in that plan, and the plan was clearly favorable to Republican interests and detrimental to Democratic interests.

In District 1, House Plan A.1 split Nash, Wilson, Pitt, Lenoir and Wayne Counties, and the district stretched nearly all the way to the Atlantic Ocean, with only Currituck County separating the district from the coast. House Plan B, which was the House's second offer to the Senate, moved Camden County into District 3, left Chowan, Perquimans, Pasquotank and all of Washington in District 1, and left Nash County divided. House Plan B. 1, the third proposal to the Senate, made Nash County (Senator Cooper's home county) whole by putting it in District 2, but still left Camden, Washington, Perquimans and Pasquotank in District 1. (These counties were all part of Senator Marc Basnight's State Senate District 1.) House Plan C, the fourth offer to the Senate, moved Perquimans, Pasquotank and Chowan into District 3, and probably for the first time divided Craven and Jones Counties. There were then a series of House plans (Plans D through J), where most (though not all) of the changes related to Districts 2 and 4. It was not until nearly the end of the entire negotiation process that Washington County was divided at the Senate's request. This essentially was the end of a slow retreat by the House from Senate District 1, so that its boundaries did not overlap congressional districts. In addition, Chowan and the other counties to the east were kept together because of economic ties.

The progression of Districts 1 and 12 from the initial House Plan A.1 to the 1997 Plan, moved towards the Senate plan, with the movement being quicker in District 12. Looking at these negotiations broadly, the House along the way obtained some of the things it was most interested in, such as placing Representative Jones' residence in his district, keeping Harnett, Johnston, Cleveland and Wilkes Counties whole, placing particular precincts in Wake and Sampson Counties in District 2 so that the district, though Democratic leaning, would still be competitive, and configuring District 9 in a satisfactory manner.

With regard to the Senate, near the end of the process, based on a legislator's request, the southern part of Granville County was included in District 2. To make up this population shift between Districts 1 and 2, northern Person County was moved from District 4 to District 1 and some precincts in Wake County were moved from District 2 to District 4.

Jones County went in and out of District 1 in various iterations of the Senate's proposals. It was included wholly in District 1 so as to approximate the old Black Second, but was eventually divided so as to allow more precincts in Wayne County to be included in District 3. In addition, all of the city of Goldsboro was included in District 1, except an agreement was reached specifically to put one Goldsboro precinct (No. 4 containing the Air Force Base) into District 3.

The division of Beaufort and Washington Counties was an attempt to approximate the western boundary of Senate District 1, and in fact, in each county there is just one precinct (or township) different between the Senate District 1 and Congressional District 3 boundaries, most likely for reasons of population balance. In Beaufort County, Washington Township and all of the county south of the river are excluded from both Congressional District 3 and Senate District 1, and the only difference in boundaries is one township north of the river. In Washington County, the congressional and senate district boundaries also are identical, with the exception of one precinct.

There were numerous iterations of District 12, with the Senate ultimately looking to create an urban piedmont district which included portions of Guilford, Forsyth and Mecklenburg Counties. Once the House -- which originally included only Mecklenburg and Guilford Counties -- agreed to include all three urban areas, decisions as to which precincts to put into the district were based on Democratic voter performance, shape and population balance (one person, one vote). Adding or removing a precinct in one area meant comparable modifications in another area, nearby or on the other side or other end of the district, which could create undesirable effects in the adjoining districts. The most desirable precincts in terms of Democratic vote could not always be included in the district because the population would not balance out. Thus, the symbiotic relationship between the lines in the three urban counties resulted in many line changes. In addition, municipality lines and major geographical features were utilized in several places. For instance, the eastern boundary of District 12 in Guilford County generally follow the Greensboro city limit line (as denoted in the General Assembly's redistricting computer data base). Similarly, much of the eastern boundary of District 12 in Forsyth County follows the Winston-Salem city limit line. In Greensboro, straight lines were drawn along the district's western edge by following precincts along Elm Street, Lee Street, and High Point Road. Similarly in Mecklenburg County, a portion of District 12 follows the precincts along South Boulevard. Additionally, several Democratic leaning districts in west Winston-Salem were left in District 5 so as to provide more home town advantage to Congressman Burr.

See also response to Interrogatory No. 32.

* * *

14. What relative weight did the General Assembly give to each of the measures of Democratic/Republican strength or support known to it prior to drawing the plan, in determining which precincts to include in each redrawn district?

RESPONSE: In the House, all three elections in the General Assembly's redistricting computer data base were used in looking at various districts. Generally, total figures were looked at and not much precinct by precinct analysis was done, except perhaps in Districts 2 and 4 at the very end of the process. Representative McMahan looked at registration data, but he assumed Republican strength was much greater than actual registration. It is not possible to reconstruct the relative weights given to the three election results in the data base during the redistricting process. In District 12, the House relied on the Senate to draw District 12 as a strong Democratic district, because it would benefit the Republican districts around District 12. Similarly, the House agreed to place Forsyth County democrats into District 12 because it helped ensure District 5 was more Republican.

In the Senate, no weight was given to party registration data. Equal weight probably was given to the Rand/Gardner and Lewis/Smith elections for pure partisan issues. Weight was given to the Helms/Gantt election when examining or analyzing racial block voting patterns for Section 2 purposes, particularly in eastern North Carolina, and in arguing for Section 5 preclearance. NCEC data that was considered by Senator Cooper included a category for "Democratic Performance" which was an analyses of data including elections more recent than the elections in the General Assembly's redistricting computer data base.

* * *

32. If you claim the 1997 plan was drawn with the specific purpose of protecting the incumbency of one or more of the existing officeholders elected in the districts of the 1992 Congressional plan in the 1996 general election, including specifically Representative Eva Clayton and Representative Mel Watt, state the facts and basis of this claim.

RESPONSE: Maintaining the six-six partisan balance of the state's congressional delegation was the most important goal in drawing the 1997 Plan. Another important consideration was protecting all twelve incumbents. Senator Cooper at one time or another spoke to all incumbents, and Representative McMahan talked with several incumbents or their representatives. *See* response to interrogatory No. 11. Some of the particular efforts made to protect the incumbents included the following. Each incumbent was put in his or her own district (except Congresswoman Sue Myrick who, at the time, resided in the same neighborhood and census block as Congressman Mel Watt) and each district was designed to favor the political party of the incumbent. (Congresswoman Myrick's residence is now in her district, although the General Assembly's redistricting computer data base does not reflect her current address or when she moved.) Congresswoman

Myrick's district was considered a favorable one for her since it included much of her home county of Mecklenburg, especially Republican areas.

One aspect of protecting incumbents was preserving the territorial, constituent and partisan cores of each district. For Congressman Hefner, all of his home county of Cabarrus was included in his district. In addition, the House had initially looked at running District 12 from Charlotte to Fayetteville, which would have had a significant effect on Hefner's and other Democratic districts. In deference to the Senate's wishes and acknowledging the need to preserve Hefner's district, the House backed off its proposal. The House also accepted the Charlotte to Greensboro route not only to preserve a Democratic district for Mel Watt, but because going anywhere else would disrupt the Republican districts bordering District 12. Congressmen Burr and Ballenger were interested in having two counties switched between their districts (as best recalled, Davie and Yadkin) as the 1997 Plan was being negotiated. Congresswoman Myrick was interested in several northern Mecklenburg precincts which were in her district in the 1992 Plan. (Having these precincts in District 12 had pushed District 12 through Cabarrus County.) Ultimately Cabarrus was not split, and Myrick only kept part of northern Mecklenburg. Splitting Charlotte Precinct 77 allowed Myrick to have heavily Republican east Mecklenburg in her district and avoided placing it in Hefner's District 8.

The original House plan did not include Forsyth County. The House, very soon after the release of its plan, agreed to include Forsyth Democrats in District 12, in part because it helped bolster the Republican strength of

Congressman Burr's district. The other reason for agreeing to the change was because Winston-Salem was the only major Triad city missing from the very urban District 12. In addition, three to five precincts that might be considered Democratic leaning in west Winston-Salem were included in Congressman Burr's district rather than in District 12 so as to provide a buffer between his home precinct and District 12 and to provide him more of a hometown advantage. This would be significant in a general election, and also in the event of a Republican primary.

In the 1992 Plan, Congressman Jones' residence was not in District 3. The original House plan put Jones' residence in the District 3 and the Senate at some point agreed to this and reached into Pitt County to place all of his hometown Farmville into District 3. Jones and his representatives were not happy with the initial Senate plan for District 3, and additional changes were made to the plan to accommodate Jones. This meant making District 1 more Democratic and District 3 more Republican. A Jones representative kept close watch over District 3 in the negotiations. Early on additional precincts on the eastern side of Wayne County, a county where Jones ran well, and outside the city of Goldsboro were moved into District 3. The Air Force base part of Goldsboro was also moved to District 3. In another area, the Senate plan had put the Republican portions of New Hanover and Pender Counties into District 7 and the more Democratic portion of Wilmington into District 3. This raised concerns because it bolstered the Democratic vote in District 3. The initial House plan was exactly the opposite, putting the Republican area of New Hanover and Pender Counties in District 3, and Democratic

Wilmington in District 7. Ultimately changes were made so that neither Pender nor New Hanover Counties were in District 3. As a result, Congressman Jones did not get the Republican areas of two counties he wanted included in his district, but he was also not forced to take the Democratic Wilmington area. In terms of Congresswoman Clayton, her home county of Warren was included in District 1. One reason for not including Durham County in District 1 was the historic differences between the African-American communities in Durham and the northeast, and not having Durham in District 1 was thought to benefit Congresswoman Clayton, especially in a primary election. Consideration had to be given to racial block voting and Section 2 considerations in drawing District 1 so that the incumbent would have a fair opportunity to be reelected. Another factor contributing to the placement of Durham in District 4 was to build a district politically favorable to Congressman Price. A large democratic portion of Wake County was included in District 2 to improve the Democratic base for Congressman Ethridge, which had weakened the Democratic base in District 4. Other accommodations which cannot be recalled in detail are reflected in the final plan.

33. What role did race play in the North Carolina General Assembly's construction of Districts 1 and 12 in the 1997 plan?

RESPONSE: Partisan voting patterns, especially Democratic voting strength drove the redistricting process in District 12. Although the summary report for each plan included racial percentages, there was never any intent to reach a particular

racial percentage. In addition, although Representative McMahan was looking primarily at election and registration data, he would pass along the racial percentage to African-Americans in the House when he was trying to gauge their support for the plan in the House. The overriding concern was to create a Democratic district. *See* responses No. 14 and 32. Race was important in drawing District 1, primarily because of Voting Rights Act considerations, but was only one of several factors. The political negotiations over Districts 2, 3 and 4, and to a lesser extent 7, all affected the political, racial and geographic features of District 1.

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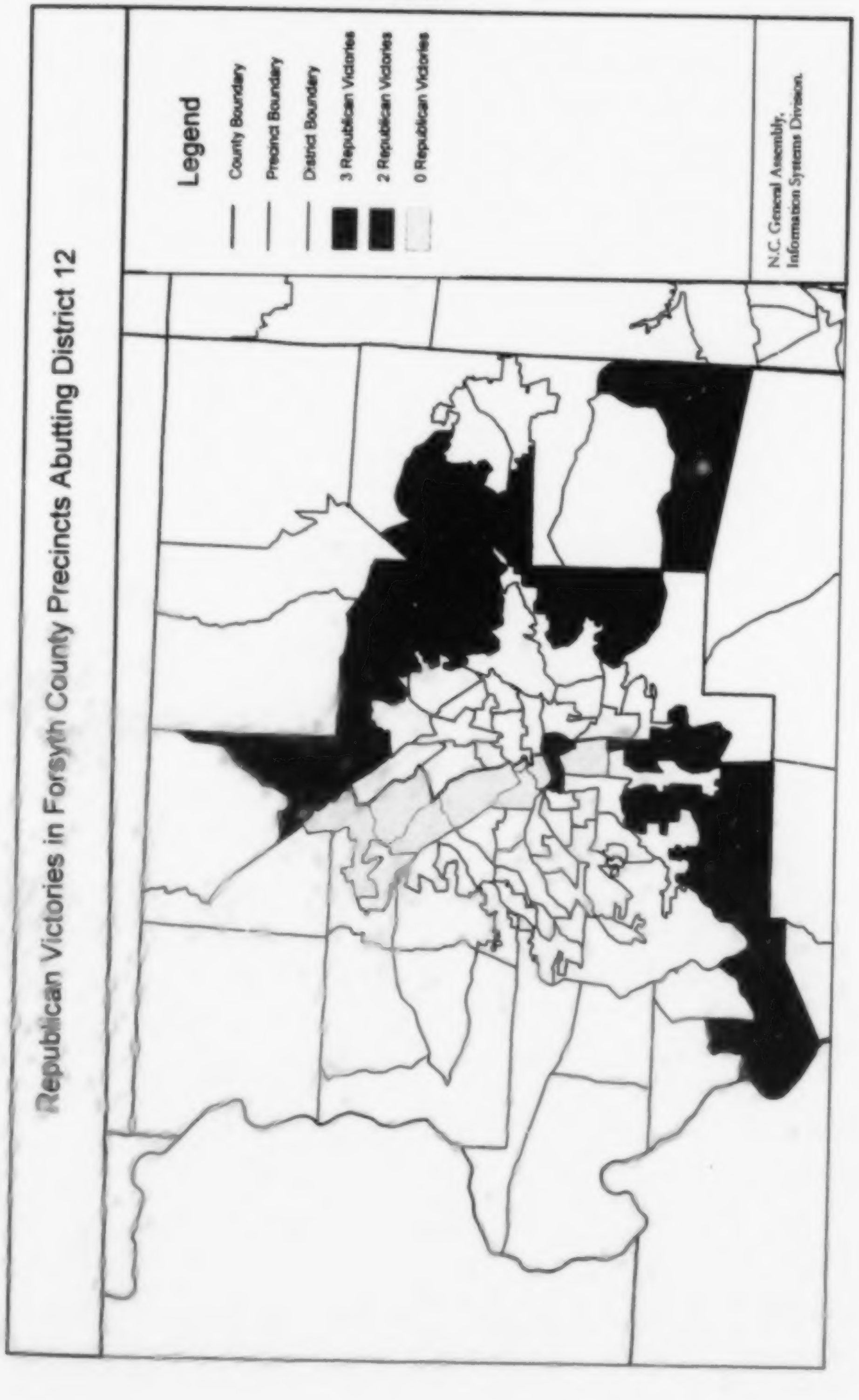

Republican Victories in Forsyth County Precincts Abutting District 12

Legend
County Boundary
Precinct Boundary
District Boundary
■ 3 Republican Victories
■ 2 Republican Victories
□ 0 Republican Victories
N.C. General Assembly,
Information Systems Division.

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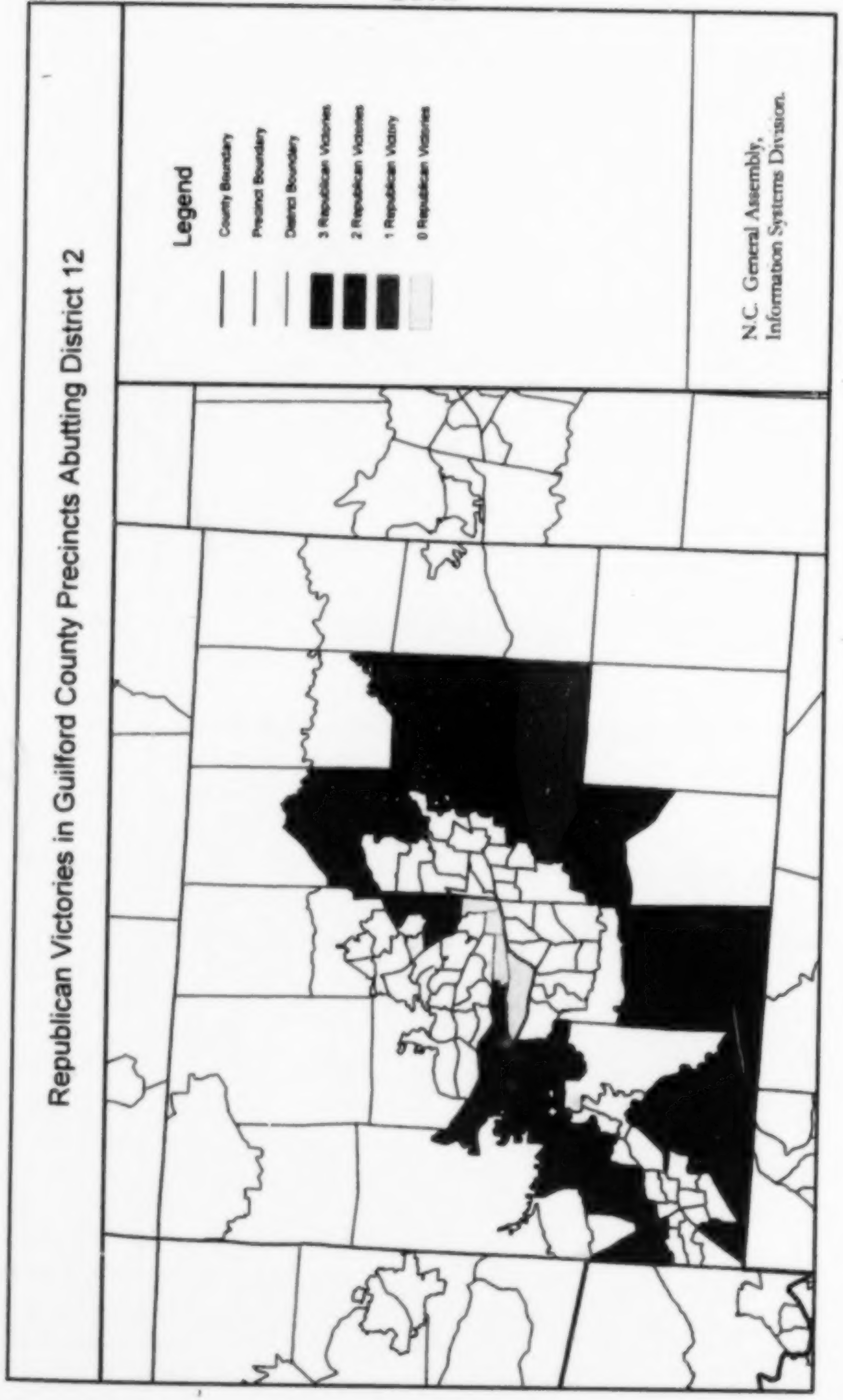
REPUBLICAN VICTORIES IN FORSYTH COUNTY PRECINCTS ABUTTING DISTRICT 12 (JOINT EXHIBIT 140 EXCERPTS)

TABLE OF REPUBLICAN VICTORIES IN FORSYTH COUNTY PRECINCTS ABUTTING DISTRICT 12

PREC. NO.	% DEM. REG.	% DEM. U.S. SEN. 1990	% DEM. LT. GOV. 1988	% DEM. CT. OF APP. 1988	NO. OF REP. WINS
0303 *	56.78	33.88	40.66	42.45	3
0401	52.22	28.62	38.02	37.37	3
0603	40.94	33.21	33.76	31.19	3
0801 *	60.11	44.57	46.51	48.23	3
0802 *	55.84	36.76	39.94	42.98	3
1436 *	55.91	57.04	53.06	52.56	0
1407	61.60	78.27	64.07	62.39	0
1403 *	55.06	52.12	53.14	50.21	0
1422 *	76.00	75.77	71.68	69.18	0
1408 *	65.75	75.46	66.30	65.84	0
1443	57.38	58.15	54.42	50.51	0
1411	51.53	59.37	49.93	47.72	2
1427 *	65.25	54.85	53.86	55.87	0
1441 *	57.37	28.29	39.60	44.23	3
1413	50.77	31.07	43.05	47.68	3
0102	38.27	22.38	29.84	29.00	3
1202	48.69	27.63	34.24	34.17	3
0503	37.58	34.75	32.78	29.65	3

* Precincts cited by district court

NOTES: The data in this Table includes: (a) 1990 Democratic voter registration data; (b) 1990 Gant-Helms U.S. Senate election results; (c) 1988 Rand-Gardner Lt. Governor election results; and (d) 1988 Lewis-Smith Court of Appeals election results. The data is provided for each precinct abutting District 12, except for that portion of the District boundary which is coterminous with Davie County and for which no precinct level data is available in the data base.


Republican Victories in Guilford County Precincts Abutting District 12

Legend
County Boundary
Precinct Boundary
District Boundary
3 Republican Victories
2 Republican Victories
1 Republican Victory
0 Republican Victories
N.C. General Assembly,
Information Systems Division.

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REPUBLICAN VICTORIES IN GUILFORD COUNTY PRECINCTS ABUTTING DISTRICT 12 (JOINT EXHIBIT 141 EXCERPTS)

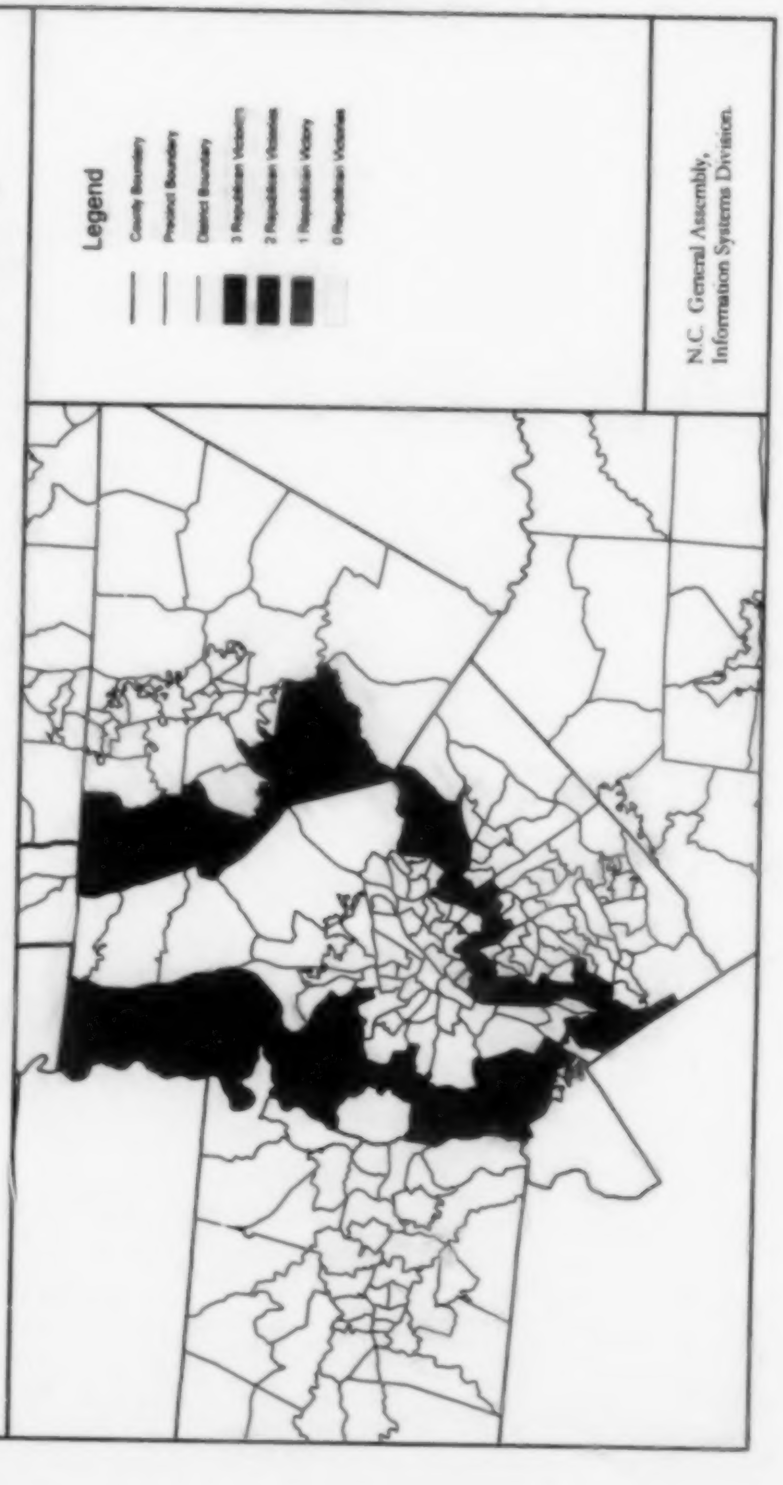
TABLE OF REPUBLICAN VICTORIES IN GUILFORD COUNTY PRECINCTS ABUTTING DISTRICT 12

PREC. NO.	% DEM. REG.	% DEM. U.S. SEN. 1990	% DEM. LT. GOV. 1988	% DEM. CT. OF APP. 1988	NO. OF REP. WINS
1103	39.64	16.48	27.11	25.80	3
0221	45.10	38.35	38.51	35.36	3
0218	47.98	27.16	32.20	32.84	3
0214	55.73	27.53	37.56	40.38	3
0204	45.74	33.96	40.55	32.26	3
0209	55.29	38.87	46.81	45.30	3
0217	53.03	47.42	46.88	43.61	3
0220	41.43	39.12	36.06	29.73	3
0223	42.89	37.27	36.67	32.07	3
0802	51.13	31.34	38.64	33.55	3
3124	32.86	56.56	47.92	43.58	2
0122	52.08	55.40	48.58	43.22	2
0143	51.76	56.42	47.04	43.81	2
0123 *	59.68	50.59	51.95	51.38	0
0117 *	61.86	65.08	61.68	58.19	0
0114 *	58.14	86.91	65.66	63.92	0

PREC. NO.	% DEM. REG.	% DEM. U.S. SEN. 1990	% DEM. LT. GOV. 1988	% DEM. CT. OF APP. 1988	NO. OF REP. WINS
0111 *	62.32	67.51	61.68	52.98	0
0112 *	60.21	43.62	52.73	34.81	2
0128 *	56.74	44.34	50.78	39.31	2
2135	43.54	46.81	48.87	38.09	3
3135 *	66.22	66.40	49.01	38.13	2
1402 *	57.27	32.72	42.73	42.51	3
1602	47.99	19.18	33.33	28.64	3
1202 *	63.29	45.76	53.37	52.26	1
0702	51.94	27.77	37.41	32.14	3
1201 *	55.17	31.19	45.19	44.51	3
0208	44.79	36.44	39.19	33.16	3

* Precincts cited by district court

NOTES: The data in this Table includes: (a) 1990 Democratic voter registration data; (b) 1990 Gant-Helms U.S. Senate election results; (c) 1988 Rand-Gardner Lt. Governor election results; and (d) 1988 Lewis-Smith Court of Appeals election results. The data is provided for each precinct abutting District 12, except for that portion of the District boundary which is coterminous with Davie County and for which no precinct level data is available in the data base.


Legend
County Boundary
Precinct Boundary
District Boundary
3 Republican Victories
2 Republican Victories
1 Republican Victory
0 Republican Victories

Republican Victories in Mecklenburg/Cabarrus County Precincts Abutting District 12

N.C. General Assembly,
Information Systems Division.

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REPUBLICAN VICTORIES IN MECKLENBURG/CABARRUS COUNTY PRECINCTS ABUTTING DISTRICT 12 (JOINT EXHIBIT 142 EXCERPTS)

TABLE OF REPUBLICAN VICTORIES IN MECKLENBURG/CABARRUS PRECINCTS ABUTTING DISTRICT 12

MECK. PREC. NO.	% DEM. REG.	% DEM. U.S. SEN. 1990	% DEM. LT. GOV. 1988	% DEM. CT. OF APP. 1988	NO. OF REP. WINS
0601	51.26	49.43	42.26	37.13	3
0104 *	54.50	51.76	42.12	38.16	2
0195	50.46	60.77	48.04	43.44	2
0184	53.44	64.22	48.15	46.57	2
0145 *	59.10	47.60	45.30	42.05	3
0105	57.03	60.45	50.35	47.62	1
0133 *	55.72	51.07	43.87	38.67	2
0134 *	54.60	49.01	46.19	44.87	3
0107 *	54.27	61.88	52.61	49.08	1
0135	53.14	59.88	49.41	38.19	2
0147	49.57	47.03	40.70	27.37	3
0118	47.78	46.80	42.73	27.24	3
0101	51.30	57.77	45.27	35.41	2
0108	49.01	50.28	42.54	28.55	2

MECK. PREC. NO.	% DEM. REG.	% DEM. U.S. SEN. 1990	% DEM. LT. GOV. 1988	% DEM. CT. OF APP. 1988	NO. OF REP. WINS
0120	55.02	56.40	49.69	38.10	2
0110 *	63.45	73.01	62.66	55.78	0
0121 *	59.45	60.11	52.32	48.30	1
0151	51.66	54.90	43.68	38.14	2
0138	51.82	54.33	44.95	40.67	2
0137	53.37	47.81	41.89	37.79	3
0150	51.18	48.89	39.27	36.21	3
0159	50.65	50.57	38.01	34.23	2
0158	49.09	49.69	42.68	38.73	3
0176	36.61	46.59	34.85	24.45	3
0192	28.29	49.40	32.38	22.44	3
1601	40.83	48.38	34.25	28.40	3
1801	51.87	47.50	48.91	36.66	3
0301 *	58.82	42.90	45.58	42.97	3
0179 *	56.46	42.25	42.96	40.49	3
0180	52.37	47.40	42.18	39.11	3
0189 *	54.21	25.37	31.71	28.49	3
1401 *	59.14	30.23	26.56	34.42	3

MECK. PREC. NO.	% DEM. REG.	% DEM. U.S. SEN. 1990	% DEM. LT. GOV. 1988	% DEM. CT. OF APP. 1988	NO. OF REP. WINS
1501	49.00	33.04	31.03	27.44	3
1001 *	59.22	45.18	46.65	44.74	3
0901	43.99	41.87	34.20	26.16	3

CABAR. PREC. NO.	% DEM. REG.	% DEM. U.S. SEN. 1990	% DEM. LT. GOV. 1988	% DEM. CT. OF APP. 1988	NO. OF REP. WINS
0301	49.73	31.54	40.28	37.20	3
0204	37.80	33.20	36.84	34.17	3
0203	41.68	32.48	36.75	34.26	3
0103	49.59	30.89	37.69	36.64	3
0101	42.37	42.03	36.43	33.00	3

* Precincts cited by district court

NOTES: The data in this Table includes: (a) 1990 Democratic voter registration data; (b) 1990 Gant-Helms U.S. Senate election results; (c) 1988 Rand-Gardner Lt. Governor election results; and (d) 1988 Lewis-Smith Court of Appeals election results. The data is provided for each precinct abutting District 12, except for that portion of the District boundary which is coterminous with Davie County and for which no precinct level data is available in the data base.

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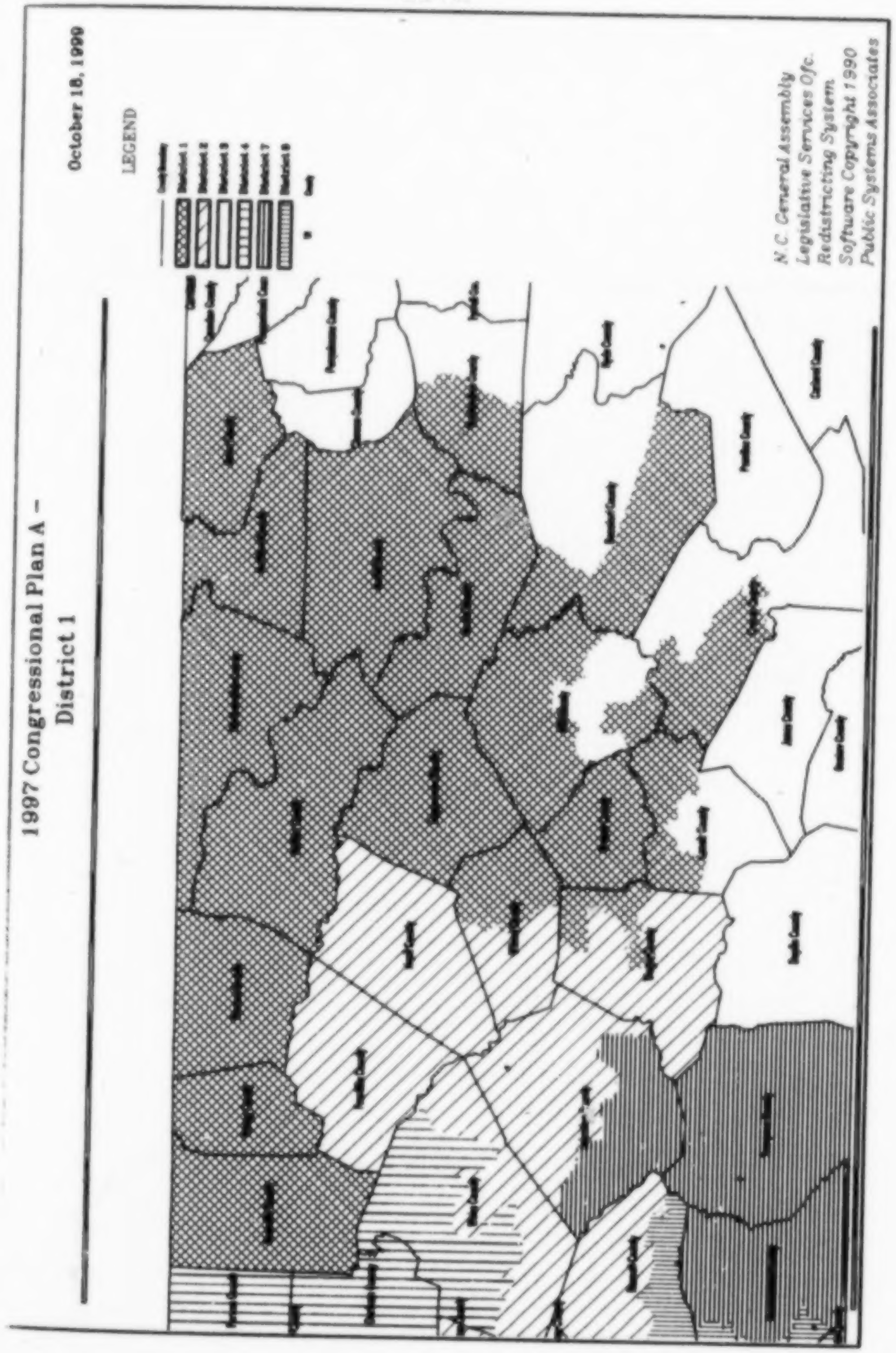

1997 Congressional Plan A –
District 1

October 18, 1990
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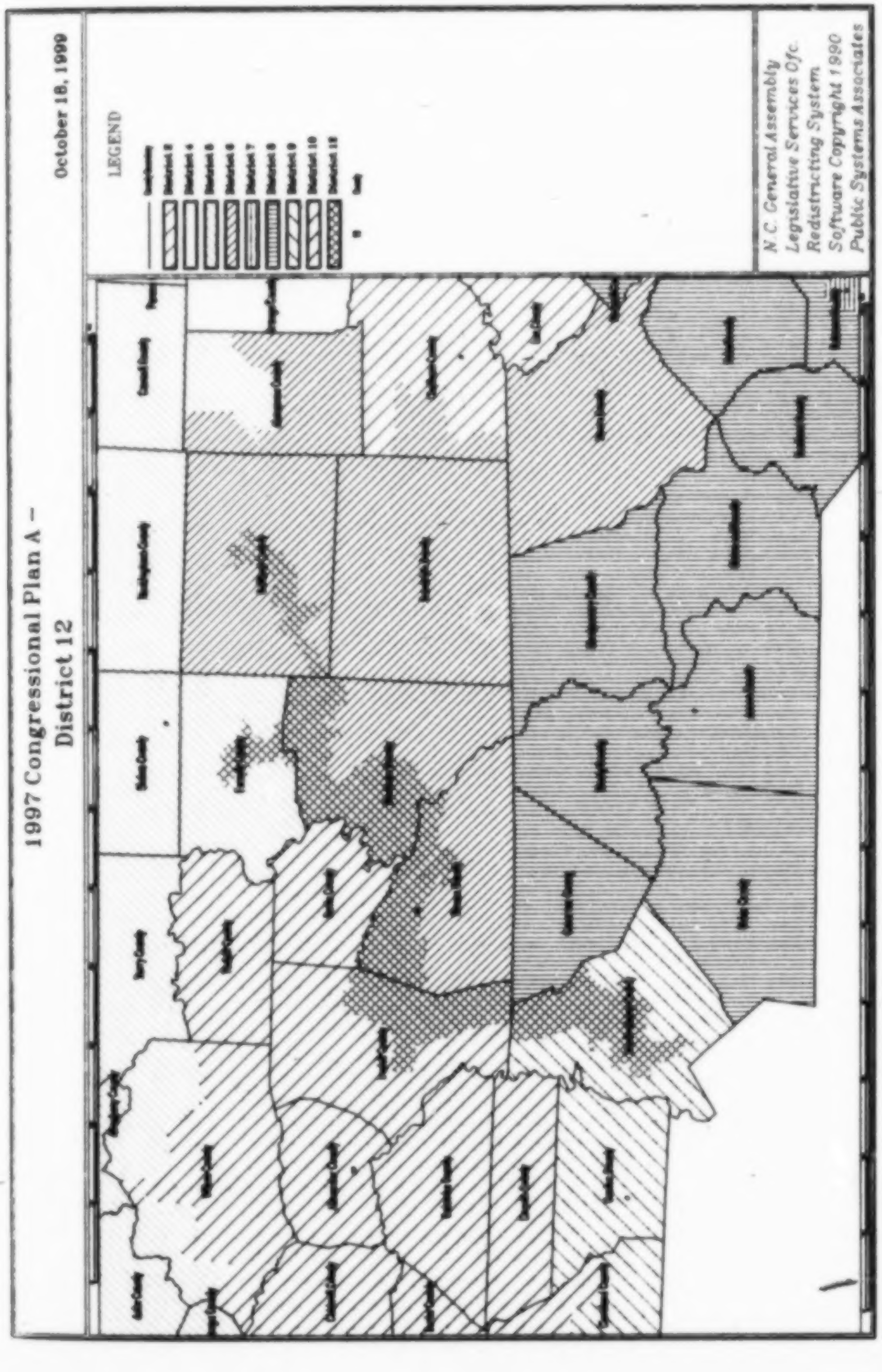
1997 Congressional Plan A –
District 12
October 18, 1999
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EXCERPTS FROM DISTRICT SUMMARIES FOR 1997 CONGRESSIONAL PLAN A

TOTAL POPULATIONS, ALL AGES

Dist	Pop	White	Black	Am Ind	Asian/PI	Other
1	551,867	269,154	276,565	3,415	1,319	1,415
	100%	48.77%	50.11%	0.62%	0.24%	0.26%
12	552,630	283,264	260,215	2,252	5,169	1,731
	100%	51.26%	47.09%	0.41%	0.94%	0.31%

VOTING AGE POPULATIONS

Dist	Pop	White	Black	Am Ind	Asian/PI	Other
1	402,890	211,720	186,950	2,405	923	950
	100%	52.55%	46.40%	0.60%	0.23%	0.24%
12	414,458	226,710	181,532	1,645	3,456	1,115
	100%	54.70%	43.80%	0.40%	0.83%	0.27%

REGISTRATION

Dist	Pop	White	Black	Other	Dem	Repub
1	269,324	147,513	120,342	1,453	232,287	31,893
	100%	54.77%	44.68%	0.54%	86.25%	11.84%
12	280,089	152,229	127,154	706	199,880	66,177
	100%	54.35%	45.40%	0.25%	71.36%	23.63%

ELECTIONS

Dist	Senate Gantt	Senate Helms	Lt. Gov. Rand	Lt. Gov. Gardner	Court Lewis	Court Smith
1	84,252	73,258	96,705	59,882	102,099	43,884
	53.49%	46.51%	61.76%	38.24%	69.94%	30.06%
12	107,761	54,646	95,262	57,894	86,162	54,033
	66.35%	33.65%	62.20%	37.80%	61.46%	38.54%

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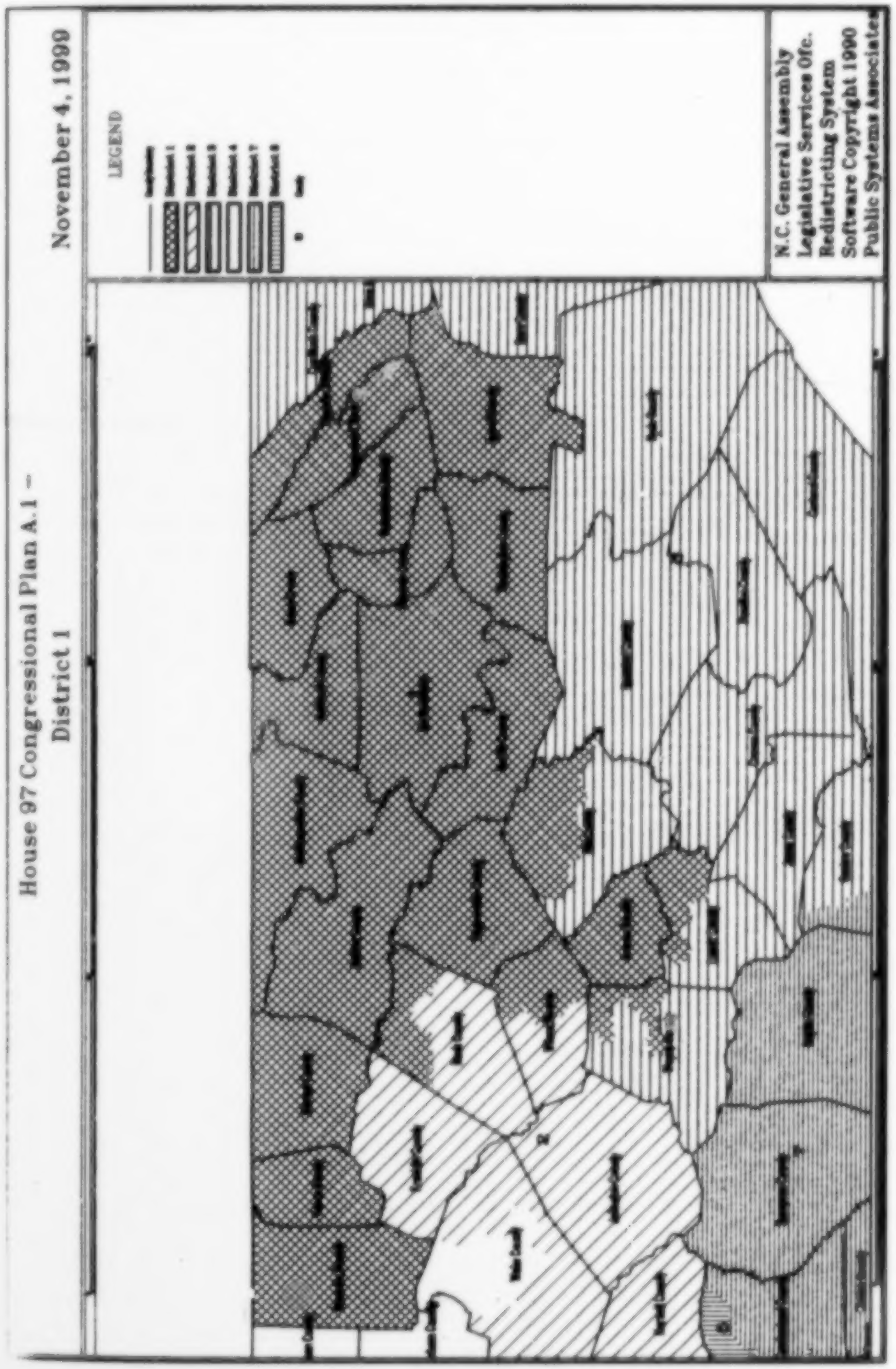
House 97 Congressional Plan A.1 –
District 1
November 4, 1999
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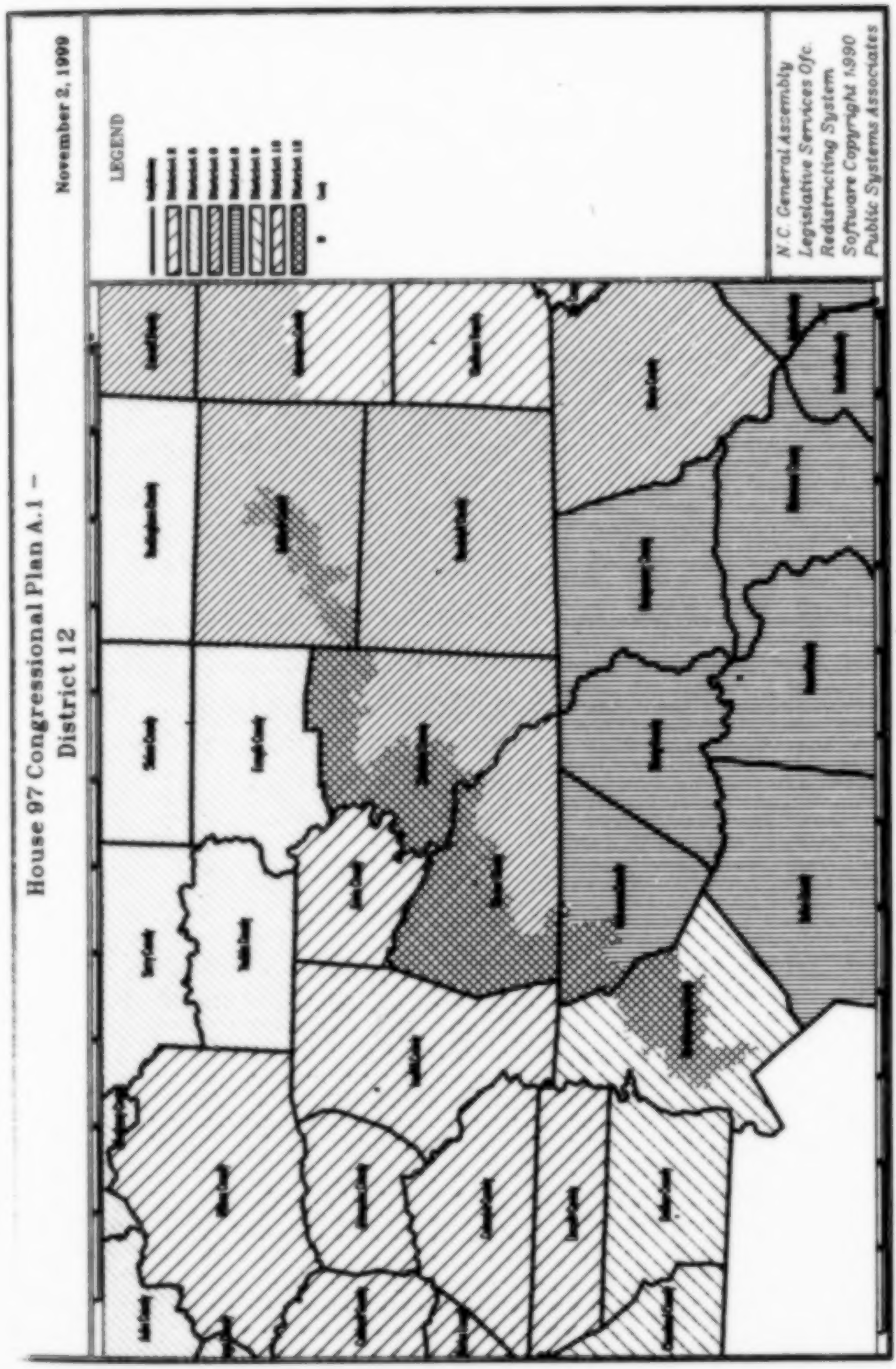
House 97 Congressional Plan A.1 –
District 12
November 2, 1999
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EXCERPTS FROM DISTRICT SUMMARIES FOR HOUSE 97 CONGRESSIONAL PLAN A.1

Total Populations, All Ages

Dist	Pop	White	Black	Am Ind	Asian/PI	Other
1	551,940	268,348	277,404	3,478	1,413	1,298
	100%	48.62%	50.26%	0.63%	0.26%	0.24%
12	551,710	320,233	220,786	2,439	6,452	1,801
	100%	58.04%	40.02%	0.44%	1.17%	0.33%

Voting Age Populations

Dist	Pop	White	Black	Am Ind	Asian/PI	Other
1	402,972	210,724	188,002	2,458	982	864
	100%	52.29%	46.65%	0.61%	0.24%	0.21%
12	418,004	256,574	154,088	1,768	4,357	1,217
	100%	61.38%	36.86%	0.42%	1.04%	0.29%

Registration

Dist	Pop	White	Black	Other	Dem	Repub
1	267,461	144,133	121,822	1,506	232,978	29,655
	100%	53.89%	45.55%	0.56%	87.11%	11.09%
12	277,866	167,996	108,986	884	188,247	73,852
	100%	60.46%	39.22%	0.32%	67.75%	26.58%

Elections

Dist	Senate Gantt	Senate Helms	Lt. Gov. Rand	Lt. Gov. Gardner	Court Lewis	Court Smith
1	84,552	70,465	96,622	57,085	100,740	41,594
	54.54%	45.46%	62.86%	37.14%	70.78%	29.22%
12	100,148	60,668	88,449	62,440	80,013	59,077
	62.27%	37.73%	58.62%	41.38%	57.53%	42.47%

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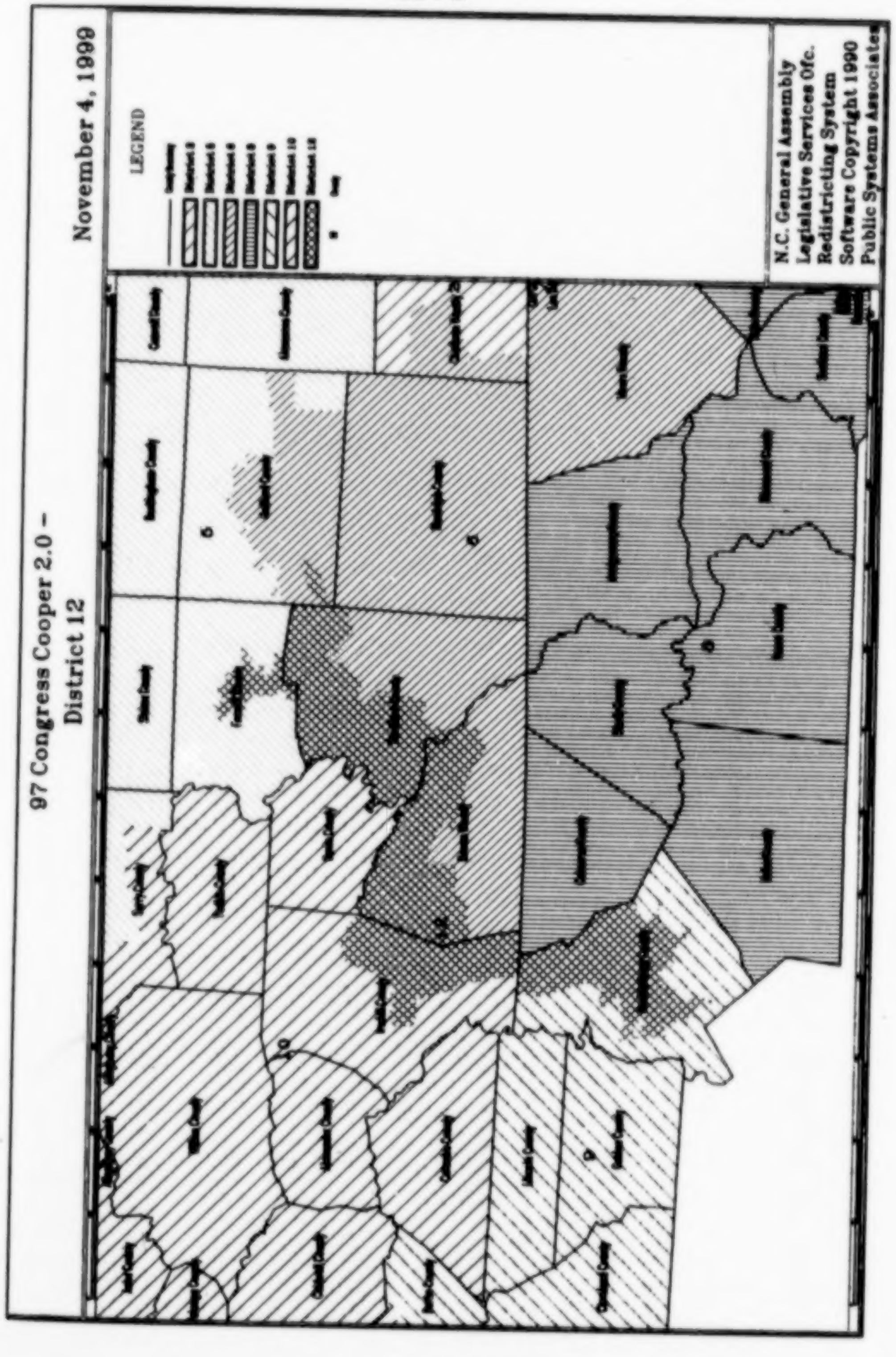

97 Congress Cooper 2.0 –
District 12

November 4, 1999

N.C. General Assembly
Legislative Services Ofc.
Redistricting System
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EXCERPTS FROM DISTRICT SUMMARIES FOR 97 CONGRESS COOPER 2.0

Total Population, All Ages

Dist	Pop	White	Black	Am Ind	Asian/PI	Other
1	551,434	280,659	264,800	3,394	1,142	1,440
	100%	50.90%	48.02%	0.62%	0.21%	0.26%
12	551,508	320,511	220,672	2,043	6,259	2,023
	100%	58.12%	40.01%	0.37%	1.13%	0.37%

Voting Age Populations

Dist	Pop	White	Black	Am Ind	Asian/PI	Other
1	404,733	221,039	179,543	2,400	816	993
	100%	54.61%	44.36%	0.59%	0.20%	0.25%
12	417,019	257,484	152,347	1,501	4,315	1,372
	100%	61.74%	36.53%	0.36%	1.03%	0.33%

Registration

Dist	Pop	White	Black	Other	Dem	Repub
1	270,215	152,780	116,007	1,428	231,905	33,081
	100%	56.54%	42.93%	0.53%	85.82%	12.24%
12	270,186	169,148	100,157	881	180,459	74,438
	100%	62.60%	37.07%	0.33%	66.79%	27.55%

Elections

Dist	Senate Gantt	Senate Helms	Lt. Gov. Rand	Lt. Gov. Gardner	Court Lewis	Court Smith
1	83,981	75,769	96,913	61,105	102,903	45,120
	52.57%	47.43%	61.33%	38.67%	69.52%	30.48%
12	101,650	59,000	87,434	64,668	77,987	59,828
	63.27%	36.73%	57.48%	42.52%	56.59%	43.41%

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OPINIONS OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 14, 1998

[Caption Omitted in Printing]

MEMORANDUM OPINION

This matter is before the Court on the Plaintiffs' Motions for Preliminary Injunction and for Summary Judgment, and on the Defendants' Motion for Summary Judgment. The underlying action challenges the congressional redistricting plan enacted by the General Assembly of the State of North Carolina on March 31, 1997, contending that it violates the Equal Protection Clause of the Fourteenth Amendment, and relying on the line of cases represented by *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996) ("*Shaw II*"), and *Miller v. Johnson*, 515 U.S. 900, 904, 115 S. Ct. 2475, 2482, 132 L. Ed. 2d 762 (1995).

Following a hearing in this matter on March 31, 1998, the Court took the parties' motions under advisement and thereafter issued an Order and Permanent Injunction (1) finding that the Twelfth Congressional District under the 1997 North Carolina Congressional Redistricting Plan is unconstitutional, and granting Plaintiffs' Motion for Summary Judgment as to the Twelfth Congressional District; (2) granting Plaintiffs' Motion for Preliminary Injunction and granting Plaintiffs' request, as contained in its Complaint, for a Permanent Injunction, thereby enjoining Defendants from conducting any primary or general election for congressional offices under the redistricting plan enacted as 1997 N.C. Session Laws, Chapter 11; and (3) ordering that the parties file a written submission addressing an appropriate time period within which the North Carolina General Assembly may be allowed the opportunity to correct the constitutional defects in the 1997 Congressional Redistricting Plan, and to present a proposed election schedule to follow redistricting which provides for a primary election process culminating in a general congressional election to be held on Tuesday, November 3, 1998, the date of the previously scheduled general election.

That Order was issued on April 3, 1998, by a majority of the three-judge panel. Circuit Judge Sam J. Ervin, III, dissented. Defendants filed a Motion for a Stay of the April 3 Order, which was denied by this Court by Order dated April 6, 1998. Defendants also appealed the April 3 Order to the Supreme Court, and the appeal is still pending in that Court. This Memorandum and Opinion refers to that Order, and shall be the opinion of the Court.

BACKGROUND

In *Shaw II* the United States Supreme Court held that the Twelfth Congressional District created by the 1992 Congressional Redistricting Plan (hereinafter, the "1992 plan") had been race-based and could not survive the required "strict scrutiny." 517 U.S. 899, 116 S. Ct. 1894. The five plaintiffs in *Shaw* lacked standing to attack the other majority-minority district (the First Congressional District under the 1992 plan) because they were not registered voters in the district. *Id.*

Soon after the Supreme Court ruled in *Shaw II*, three residents of Tarboro, North Carolina, filed the original Complaint in this action on July 3, 1996. These original Plaintiffs resided in the First Congressional District (alternatively, "District 1") as it existed under North Carolina's 1992 plan. The Plaintiffs charged that the First Congressional District violated their rights to equal protection under the United States Constitution because race predominated in the drawing of the District. The action was stayed pending resolution of remand proceedings in *Shaw v. Hunt*, and on July 9, 1996, the same three Tarboro residents joined the Plaintiffs in *Shaw* in filing an Amended Complaint in that case, similarly challenging District l.

By Order dated September 12, 1997, the three-judge panel in *Shaw* approved a congressional redistricting plan enacted on March 31, 1997, by the General Assembly as a remedy for the constitutional violation found by the Supreme Court to exist in the Twelfth Congressional District (alternatively, "District 12"). The *Shaw* three-judge panel also dismissed without prejudice, as moot, the plaintiffs' claim that the First Congressional District in the 1992 plan was unconstitutional. Although it was a final order, the September 12, 1997, decision of the *Shaw* three-judge panel was not preclusive of the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan.[1]

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[1] In its final Memorandum Opinion, the three-judge panel in *Shaw*, noted that there was "no substantive challenge to the [1997] plan by any party to this action," and closed by explicitly "noting the limited basis of the

(continued...)

On October 17, 1997, this Court dissolved the stay previously entered in this matter. On the same day, two of the original three Plaintiffs, along with four residents of District 12, filed an amended Complaint challenging the 1997 remedial congressional redistricting plan (the "1997 plan"), and seeking a declaration that the First and Twelfth Congressional Districts in the 1997 plan are unconstitutional racial gerrymanders. The three-judge panel was designated by order of Chief Judge Wilkinsion [sic] of the Fourth Circuit Court of Appeals, dated January 23, 1998. The Plaintiffs moved for a preliminary injunction on January 30, 1998, and for summary judgment on February 5, 1998. The Defendants filed their instant summary judgment motion on March 2, 1998, and a hearing on these motions was held on March 31, 1998.

FACTS

The North Carolina General Assembly convened in regular session on January 29, 1997, and formed redistricting committees to address the defects found in the 1992 plan.

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[1] (...continued)
approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not-cannot-run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12." *Shaw v. Hunt*, No. 92-202-CIV-5-BR, at 3 (E.D.N.C. Sept. 12, 1997).

These newly formed House and Senate Committees aimed to identify a plan which would cure the constitutional defects and receive the support of a majority of the members of the General Assembly. Affidavit of Senator Roy A. Cooper, III ("Cooper Aff.") ¶3. In forming a workable plan, the committees were guided by two avowed goals: (1) curing the constitutional defects of the 1992 plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation. Cooper Aff. ¶¶5, 8, 10, 14; Affidavit of Gary O. Bartlett, Executive Secretary-Director of the State Board of Elections ("Bartlett Aff."), Vol. I Commentary at 9-10.

To achieve the second goal, the redistricting committees draw the new plan (1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan. Cooper Aff. ¶14. The plan as enacted reflects these directives: no two incumbent Congressmen reside in the same district, and each district retains at least 60% of the population of the old district. Cooper Aff. ¶8, Affidavit of Representative W. Edwin McMahan ("McMahan Aff.") ¶7.

I. The Twelfth Congressional District

District 12 is one of the six predominantly Democratic districts established by the 1997 plan to maintain the 6-6 partisan division in North Carolina's congressional delegation.

District 12 is not a majority-minority district,[2] but 46.67 percent of its total population is African-American. Bartlett Aff., Vol. I Commentary at 10 and 11. District 12 is composed of six counties, all of them split in the 1997 plan. The racial composition of the parts of the six sub-divided counties assigned to District 12 include three with parts over 50 percent African-American, and three in which the African-American percentage is under 50 percent. Declaration of Ronald E. Webber ("Webber Dec.") ¶18. However, almost 75 percent of the total population in District 12 comes from the three county parts which are majority African-American in population: Mecklenburg, Forsyth, and Guilford counties. *Id.* The other three county parts (Davidson, Iredell, and Rowan) have narrow corridors which pick up as many African-Americans as are needed for the district to reach its ideal size.[3] *Id.*

Where Forsyth County was split, 72.9 percent of the total population of Forsyth County allocated to District 12 is African-American, while only 11.1 percent of its total population assigned to neighboring District 5 is African-American. *Id.* ¶20. Similarly, Mecklenburg County is split so 51.9 percent of its total population allocated to District 12 is African-

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[2] The Twelfth is not a majority-minority district as measured by any of three possible criteria. African-Americans constitute 47 percent of the total population of District 12, 43 percent of the voting age population of the District, and 46 percent of the registered voters in the District. Peterson Aff., at 8.

[3] An equitably populated congressional district in North Carolina needs a total population of about 552,386 persons using 1990 Census data. Weber Dec. ¶39.

American, while only 7.2 percent of the total population assigned to adjoining District 9 is African-American.

A similar pattern emerges when analyzing the cities and towns split between District 12 and its surrounding districts: the four largest cities assigned to District 12 are split along racial lines. *Id.* ¶23. For example, where the City of Charlotte is split between District 12 and adjacent District 9, 59.47 percent of the population assigned to District 12 is African-American, while only 8.12 percent of the Charlotte population assigned to District 9 is African-American. Affidavit of Martin B. McGee ("McGee Aff."), Ex. L. And where the City of Greensboro is split, 55.58 percent of the population assigned to District 12 is African-American, while only 10.70 percent of the population assigned to District 6 is African-American. *Id.*

An analysis of the voting precincts immediately surrounding District 12 reveals that the legislature did not simply create a majority Democratic district amidst surrounding Republican precincts. For example, around the Southwest edge of District 12 (in Mecklenburg County), the legislature included within the district's borders several precincts with racial compositions of 40 to 100 percent African-American; while excluding from the district voting precincts with less than 35 percent African-American population, but heavily Democratic voting registrations. Among Mecklenburg County precincts which are immediately adjacent to District 12, but not inside it, are precincts with 58.818 percent of voters registered as Democrats, and precincts that are 56.464 percent Democratic 54.213 percent Democratic, 59.135 percent Democratic, 59.225 percent Democratic, 54.498 percent Democratic, 59.098

percent Democratic, 55.72 percent Democratic, 54.595 percent Democratic, 54.271 percent Democratic, 63.452 percent Democratic, and 59.453 percent Democratic. *Id.*, Ex. P. Similarly, Forsyth County precincts that are immediately adjacent to, but not inside, District 12 include precincts with 57.371 percent Democratic registration, 65.253 percent Democratic registration, 65.747 percent Democratic registration, 65.747 percent Democratic registration, 76 percent Democratic registration, 55.057 percent Democratic registration, 55.907 percent Democratic registration, 56.782 percent Democratic registration, 55.836 percent Democratic registration, and 60.113 percent Democratic registration. *Id.*, Ex. O. Finally, District 12 was drawn to exclude precincts with 59.679 percent Democratic registration, 61.86 percent Democratic registration, 58.145 percent Democratic registration, 62.324 percent Democratic registration, 60.209 percent Democratic registration, 56.739 percent Democratic registration, 66.22 percent Democratic registration, 57.273 percent Democratic registration, 55.172 percent Democratic registration, and 63.287 percent Democratic registration, all in Guilford County. *Id.*, Ex. N.

On the North Carolina map, District 12 has an irregular shape and is barely contiguous in parts. Its Southwest corner lies in Mecklenburg County, very close to the South Carolina border, and includes parts of Charlotte. The District moves North through Rowan County and into Iredell County. There it juts West to pick up parts of the City of Statesville. More than 75 percent of the Statesville population that is included in District 12 is African-American, while only 18.88 percent of

the population of Statesville excluded from District 12 is African-American. McGee Aff., Ex. L. From Statesville, the District moves East into Rowan County. There it dips to the South to include Salisbury, before turning to the Northeast and entering Davidson County and the City of Thomasville. Over 41 percent of the populations of Salisbury and Thomasville that are included in District 12 are African-American, while only 15.39 and 9.55 percent, respectively, of those that are excluded from the District are African American. *Id.* The District makes a northwesterly incursion into Forsyth County to include parts of Winston-Salem, where 77.39 percent of the population within District 12 is African-American, and only 16.06 percent of the population left out is African-American. *Id.* The District moves to the East and narrows dramatically before opening up again to include the predominantly African-American parts of Greensboro, where the District ends.

Objective, numerical studies of the compactness of congressional districts are also available. In his report, "An Evaluation of North Carolina's 1998 Congressional Districts," Professor Gerald R. Webster, one of the Defendants' expert witnesses, presents statistical analyses of "comparator compactness indicators" for North Carolina's congressional districts under the 1997 plan. In measuring the districts' dispersion compactness[4] and perimeter compactness,[5] Professor Webster

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[4] "Dispersion compactness" measures the geographic "dispersion" of a district. To calculate this a circle is circumscribed around a district. The reported coefficient is the proportion of the area of the circumscribed circle which is also included in the district. This measure ranges from 1.0

(continued...)

offers two of the "most commonly recognized and applied" compactness indicators. Webster, at 13 (citing Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*, 92 Mich. L. Rev. 483, 571-573, table 6 (1993) (hereinafter, "Pildes & Niemi"); *and see Bush v. Vera*, 517 U.S. 952, ___, 116 S. Ct. 1941, 1952, 135 L. Ed. 2d 248 (1996) (citing Pildes & Niemi compactness factors as supporting evidence for holding three Texas congressional districts unconstitutional).

In discussing the relative normalcy of various compactness measures, Pildes and Niemi suggest that a "low" dispersion compactness measure would be equal to or less than 0.15. Pildes & Niemi, at 564. They suggest that a "low" perimeter compactness measure is equal to or less than 0.05. *Id.* North Carolina's Twelfth Congressional District under the 1997 plan has a dispersion compactness indicator of 0.109 and a perimeter indicator of 0.041. Webster, at table 3. These figures are much lower than the mean compactness indicators for North Carolina's twelve congressional districts under the 1997 plan. The average dispersion compactness indicator for the State is 0.354, and the average perimeter compactness

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[4] (...continued)
(most compact) to 0. 0 (least compact). Webster, at 14.

[5] "Perimeter compactness" is based upon the calculation of the district's perimeter. The reported coefficient is the proportion of the area in the district relative to a circle with the same perimeter. This measure ranges from 1.0 (most compact) to 0.0 (least compact). Webster, at 14. The equation used here is (((4 x ∏) x Area of district) ÷ (District's Perimeter2)). Webster, at table 3.

indicator is 0.192. *Id.* The next lowest dispersion compactness indicator after District 12 is the 0.206 in the Fifth Congressional District, and the next lowest perimeter compactness indicator is the First Congressional District's 0.107. *Id.*

II. The First Congressional District

District 1 is another predominantly Democratic district established by the 1997 plan. Unlike District 12, it is a majority-minority district, based on percentages of the total population of the District,[6] as 50.27 percent of its total population is African-Americans. *Id.*, Vol. I Commentary at 10. District 1 is composed of ten of the 22 counties split in drawing the statewide 12 district 1997 plan. Weber Dec. ¶16. Half of the twenty counties represented in District 1 are split. *Id.* Of the ten sub-divided counties assigned to District 1, four have parts with over 50 percent African-American population, four others have parts with over 40 percent African-American population, and two others have parts with over 30 percent African-American population. *Id.*, ¶17.

In each of the ten counties that are split between District 1 and an adjacent district, the percent of the population that is African-American is higher inside the district than it is outside the district, but within the same county. *Id.*, ¶19 and Table 2. The disparities are less significant than in the county splits involving District 12. *Id.*, Table 2. For example, where Beaufort County is split between Districts 1 and 3, 37.7 percent of the total population of Beaufort County allocated to District 1 is African-American, while 22.9 percent of the total population of Beaufort County assigned to District 3 is African-American.

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[6] While 50.27 percent of the total population of District 1 is African-American, only 46.54 percent of the voting age population is African-American, based on the 1990 census data. Bartlett Aff., Vol. I Commentary at 10.

Similarly, nine of the 13 cities and towns split between District 1 and its neighboring districts are split along racial lines. *Id.*, ¶22. For example, where the City of New Bern is split between District 1 and adjacent District 3, 48.27 percent of the population assigned to District 1 is African-American, while 24.49 percent of the New Bern population assigned to District 3 is African-American. McGee Aff., Ex. L.

Viewed on the North Carolina map, District 1 is not as irregular as District 12. In the North, it spans 151.2 miles across, from Roxboro, Person County, in the West, to Sunbury, Gates County, in the East. Affidavit of Dr. Alfred W. Stuart ("Stuart Aff."), table 1. It is shaped roughly like the state of Florida, although the protrusion to the South from its "panhandle" is only approximately 150 miles long (to Goldsboro, Wayne County, with two irregularities jutting into Jones, Craven, and Beaufort Counties. Cooper Aff., attachments. These irregularities surround the peninsular extension of the Third Congressional District from the East, allowing the incumbent from the previous Third Congressional District to retain his residence within the boundaries of the same district, and avoiding placing two incumbents in District 1.

The "comparator compactness indicators" from District 1 are much closer to the North Carolina mean compactness indicators than are those from District 12. For example, District 1 has a dispersion compactness indicator of 0.317 and a perimeter compactness indicator of 0.107. Webster, at table 3. This dispersion compactness indicator is not significantly lower than the State's mean indicator of 0.354, and is higher than the dispersion compactness indicators of Districts 12 (0.109), 9 (0.292), and 5 (0.206). *Id.* It may be noted that Districts 5 and 9 are next to, and necessarily shaped by, District 12. District 1 has a perimeter compactness indicator of 0.107, which is lower than North Carolina's mean perimeter compactness indicator (0.192), but much higher than Pildes and Niemi's suggested "low" perimeter compactness indicator (0.05). District 1's perimeter compactness indicator is also much higher than that of District 12 (0.041). *Id.*

DISCUSSION

The Equal Protection Clause of the United States Constitution provides that no State "shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend, 14, § 1. The United States Supreme Court explained in *Miller v. Johnson*, 515 U.S., at 904, 115 S. Ct., at 2482, that the central mandate of the Equal Protection Clause "is racial neutrality in governmental decisionmaking." Application of this mandate clearly prohibits purposeful discrimination between individuals on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 2824, 125 L. Ed. 2d 511 (1993)

("*Shaw I*"), (citing *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L. Ed. 2d 597 (1976)).

As the Supreme Court recognized, however, the use of this principle in "electoral districting is a most delicate task." *Miller*, 515 U.S., at 905, 115 S. Ct., at 2483. Analysis of suspect districts must begin from the premise that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of [the Equal Protection Clause's] prohibition." *Shaw I*, 509 U.S., at 642, 113 S. Ct., at 2824. Beyond that, however, the Fourteenth Amendment's prohibition "extends not just to explicit racial classifications," *Miller*, 515 U.S., at 905, 115 S. Ct., at 2483, but also to laws, neutral on their face, but "unexplainable on grounds other than race," *Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252, 266, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977).

In challenging the constitutionality of a State's districting plan, the "plaintiff bears the burden of proving the race-based motive and may do so either through 'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose.' " *Shaw II*, 517 U.S., at ____, 116 S. Ct., at 1900 (quoting *Miller*, 515 U.S., at 916, 115 S. Ct., at 2488). In the final analysis, the plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.*, (quoting *Miller*, 515 U.S., at 916, 115 S. Ct., at 2488).

Once a plaintiff demonstrates that race was the predominant factor in redistricting, the applicable standard of review of the new plan is "strict scrutiny." Thus, in *Miller* the Supreme Court held that strict scrutiny applies when race is the "predominant" consideration in drawing the district lines such that "the legislature subordinate[s] race-neutral districting principles . . . to racial considerations." 515 U.S., at 916, 115 S. Ct., at 2488. Under this standard of review, a State may escape censure while drawing racial distinctions only if it is pursuing a "compelling state interest." *Shaw II*, 517 U.S., at ___, 116 S. Ct., at 1902.

However, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, 106 S. Ct. 1842, 1850, 90 L. Ed. 2d 260 (1986) (opinion of Powell, J.). As the Supreme Court required in *Shaw II*, where a State's plan has been found to be a racial gerrymander, that State must now "show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation is narrowly tailored to achieve that compelling interest." 517 U.S., at ___, 116 S. Ct., at 1902.

We are cognizant of the principle that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S. Ct. 2493, 2497, 57 L. Ed. 2d 411 (1978) (citations omitted). "A State should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity. When it does take the opportunity, the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law." *Lawyer v. Dep't of Justice*, ___ U.S. ___, ___, 117 S. Ct. 2186, 2193, 138 L. Ed. 2d 669 (1997) (internal citations omitted). Thus, when the federal courts declare an apportionment scheme unconstitutional-as the Supreme Court did in *Shaw II*-it is appropriate, "whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S., at 540, 98 S. Ct., at 2497.

I. The Twelfth Congressional District

As noted above, the final decision of the three-judge panel in *Shaw* only approved the 1997 Congressional Redistricting Plan "as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12." *Shaw v. Hunt*, No. 92-202-CIV-5-BR, at 8 (E.D.N.C. Sept. 12, 1997). In the instant case, we are faced with a ripe controversy as to the newly-configured Twelfth Congressional District. This panel must thus decide whether, as a matter of law, District 12 violates the equal protection rights of the Plaintiffs who live within the district and challenge its constitutionality.

In holding that District 12 under the 1992 plan was an unconstitutional racial gerrymander, the Supreme Court in *Shaw II* noted, "[n]o one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race." 517 U.S., at ___, 116 S. Ct., at 1906. The *Shaw II* Court thus struck the old District 12 as unconstitutional as a matter of law. In redrawing North Carolina's congressional districts in 1997 the General Assembly was, of course, aware that District 12 under the 1992 plan had been declared unconstitutional; curing the constitutional deficiencies was one of the legislature's declared goals for the redistricting process. Cooper Aff. ¶¶5, 8, 10, 14.

Defendants now argue that the changes in District 12 between the 1992 and 1997 plans are dramatic enough to cure it of its constitutional defects. They point to the fact that the new District 12 has lost nearly one-third (31.6 percent) of the population from the 1992 district and nearly three-fifths (58.4 percent) of the land. These numbers do not advance the Defendants' argument or end the Court's inquiry. As Defendants themselves note, the Court's role is limited to determining "whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights-that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place." *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988) (citing *Upham v. Seamon*, 456 U.S. 37, 42, 102 S. Ct. 1518, 1521, 71 L. Ed. 2d 725 (1982)). A comparison of the 1992 District 12 and the present District is of limited value here. The issue in this case is whether District 12 in the present plan violates the equal protection rights of the voters residing within it.

In *Shaw I*, the Supreme Court described old District 12 as "unusually shaped. It is approximately 160 miles long and for much of its length, no wider than the [Interstate]-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods." 509 U.S., at 635-636, 113 S. Ct., at 2820-2821 (internal quotations omitted). Viewed without reference to District 12 under the 1992 plan, the new District 12 is also "unusually shaped." While its length has been shortened to approximately 95 miles, it still winds its way from Charlotte to Greensboro along the Interstate-85 corridor, making detours to pick up heavily African-American parts of cities such as Statesville, Salisbury, and Winston-Salem. It also connects communities not joined in a congressional district, other than in the unconstitutional 1992 plan, since the whole of Western North Carolina was one district, nearly two hundred years ago. Pl.'s Brief Opp. Def.'s Mot. S.J., at 12.

As noted above, where cities and counties are split between District 12 and neighboring districts, the splits are exclusively along racial lines, and the parts of the divided cities and counties having a higher proportion of African-Americans are always included in District 12. Defendants argue that the Twelfth has been designed with politics and partisanship, not race, in mind. They describe the District as a "Democratic island in a Republican sea," and present expert evidence that

political identification was the predominant factor determining the border of District 12. Affidavit of David W. ("Peterson Aff."), at 2. As the uncontroverted material facts demonstrate, however, the legislators excluded many heavily-Democratic precincts from District 12, even though those precincts immediately border the District. The common thread woven throughout the districting process is that the border of District 12 meanders to include nearly all of the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive.

As noted above, objective measures of the compactness of District 12 under the 1997 plan reveal that it is still the most geographically scattered of North Carolina's congressional districts. When compared to other previously challenged and reconstituted congressional districts in North Carolina, Florida, Georgia, Illinois, and Texas, District 12 does not fare well. The District's dispersion and perimeter compactness indicators (0.109 and 0.041, respectively) are lower than those values for North Carolina's District 1 (0.317 and 0.107 under the 1997 plan). Similarly, the District suffers in comparison to Florida's District 3 (0.136 and 0.05), Georgia's District 2 (0.541 and 0.411) and District 11 (0.444 and 0.259), Illinois' District 4 (0.193 and 0.026), and Texas District 18 (0.335 and 0.151), District 29 (0.384 and 0.178), and District 30 (0.383 and 0.180).

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must demonstrate the lack of a genuine issue of fact for trial, and if that burden is met, the party opposing the motion must show evidence of a genuine factual dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

Based on the uncontroverted material facts before it, the Court concludes that the General Assembly, in redistricting, used criteria with respect to District 12 that are facially race driven. District 12 was drawn to collect precincts with high racial identification rather than political identification. Further, the uncontroverted material facts demonstrate that precincts with higher partisan representation (that is, more heavily Democratic precincts) were bypassed in the drawing of District 12 and included in the surrounding congressional districts. The legislature disregarded traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in drawing District 12 in North Carolina's 1997 plan. Instead, the General Assembly utilized race as the predominant factor in drawing the District, thus violating the rights to equal protection guaranteed in the Constitution to the citizens of District 12.[7]

To remedy these constitutional deficiencies, the North Carolina legislature must redraw the 1997 plan in such a way

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[7] The Supreme Court has indicated that, when drawing congressional districts, race may not be used as a proxy for political characteristics. *Vera v. Bush*, 517 U.S. 952, ___, 116 S. Ct. 1941, 1956, 135 L. Ed. 2d 248 (1996).

that it avoids the deprivation of the voters' equal protection rights not to be classified on the basis of race. This mandate of the Court leaves the General Assembly free, within its authority, to use other, proper factors in redrawing the 1997 plan. Among these factors, the legislature may consider traditional districting criteria, including incumbency considerations, to the extent consistent with curing the constitutional defects. *See Shaw II*, 517 U.S., at ___, 116 S. Ct., at 1901 (describing "race-neutral, traditional districting criteria").

II. First Congressional District

Based on the record before us, the Plaintiff has failed to establish that there are no contested material issues of fact that would entitle Plaintiff to judgment as a matter of law as to District 1. The Court thus denies Plaintiffs' Motion for Summary Judgment as to that District. Conversely, neither has the Defendant established the absence of any contested material issue of fact with respect to the use of race as the predominant factor in the districting of District 1 such as would entitle Defendant to judgment as a matter of law.

CONCLUSION

Based on the Order of this Court entered on April 3, 1998, and the foregoing analysis, Defendants will be allowed the opportunity to correct the constitutional defects in the 1997 Congressional Redistricting Plan, in default of which the Court would undertake the task.

This Memorandum Opinion, like the Order to which it refers, is entered by a majority of the three-judge panel. Circuit Judge Sam J. Ervin, III, dissents.

This, the 14th day of April, 1998.

TERRENCE W. BOYLE
Chief United States District Judge
RICHARD L. VOORHEES
United States District Judge

/s/ TERRENCE W, BOYLE
Chief United States District Judge

OPINIONS OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, APRIL 14, 1998

[Caption Omitted in Printing]

DISSENT

ERVIN, Circuit Judge, dissenting:

In *Shaw v. Reno*, the Supreme Court recognized a new cause of action in voting rights law -- that state legislatures could not subordinate traditional districting principles to racial considerations in drawing legislative districts without triggering strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, 509 U.S. 630 (1993) ("*Shaw I*"). Because the districting plan before us is fundamentally different from the plans struck down by the Court in *Shaw I* and its progeny, *see Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899, 135 L. Ed. 2d 207 (1996) ("*Shaw II*"); *Bush v. Vera*, 517 U.S. 952, 135 L. Ed. 2d 248 (1996), I do not believe that the Plaintiffs have proven any violation of their right to the equal protection of the laws.

North Carolina's twelfth congressional district is not a majority-minority district, it was not created as a result of strong-arming by the U.S. Department of Justice, and, contrary to the majority's assertions, it is not so bizarre or unusual in shape that it cannot be explained by factors other than race. The Plaintiffs' evidence is not so convincing as to undermine the State's contention that the 1997 Plan was motivated by a desire to remedy the constitutional violations from the 1992

Plan, to preserve the even split between Republicans and Democrats in the North Carolina congressional delegation, and to protect incumbents by drawing the districts so that each incumbent resides in a separate district. Our acceptance of the State's proffered justifications, absent more rigorous proof by the Plaintiffs, is especially appropriate in this context, considering the deference that we are bound to accord state legislative decisions in questions of redistricting. Finally, I find it inconsistent to decide, as the majority has done today, that the General Assembly, while engaging in a state-wide redistricting process, was impermissibly influenced by predominantly racial considerations in the drawing of one district (the twelfth) while evidencing no such unconstitutional predilection in the other district under challenge (the first), or for that matter, any of North Carolina's other ten congressional districts. For these reasons, I must respectfully dissent.

I.

In order to prevail on a race-predominance claim, the Plaintiffs must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. The principle that race cannot be the predominant factor in a legislature's redistricting calculus is simple. Applying that principle, on the other hand, is quite complex, because numerous factors influence a legislature's districting choices and no one factor may readily be identified as predominant.

In undertaking this analysis, it is crucial to note that in the matter of redistricting, courts owe substantial deference to the legislature, which is fulfilling "the most vital of local functions" and is entrusted with the "discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915. We presume the legislature acted in good faith absent a sufficient showing to the contrary. *Id.* A state's redistricting responsibility "should be accorded primacy to the extent possible when a federal court exercises remedial power." *Lawyer v. Department of Justice*, 138 L. Ed. 2d 669, 680 (1997).

While the majority and I appear to be in agreement on those general principles, the majority does not discuss the extent of Plaintiffs' burden in proving a claim of racial gerrymandering. Concurring in *Miller v. Johnson*, Justice O'Connor emphasized that the plaintiff's burden in cases of this kind must be especially rigorous:

> I understand the threshold standard the Court adopts . . . to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in *substantial disregard* of customary and traditional districting practices. . . . [A]pplication of the Court's standard helps achieve *Shaw*'s basic objective of making *extreme instances* of gerrymandering subject to meaningful judicial review.

Miller, 515 U.S. at 928-29 (O'Connor, J., concurring) (emphasis added). This principle was recently developed by a three-judge panel that upheld Ohio's 1992 redistricting plan for its state legislature:

> As we apply the threshold analysis developed by the Supreme Court in *Shaw* cases, we are mindful of the dangers that a low threshold (easily invoking strict scrutiny) poses for states. We therefore follow Justice O'Connor's lead in applying a *demanding threshold* that allows states some degree of latitude to consider race in drawing districts.

Quilter v. Voinovich, 981 F. Supp. 1032, 1044 (N.D. Ohio 1997), *aff'd*, 66 U.S.L.W. 3639 (U.S. Mar. 30, 1998) (No. 97-988).

The Court has recognized that legislatures often have "mixed motives" -- they may intend to draw majority-minority districts as well as to protect incumbents or to accommodate other traditional interests. *Bush v. Vera*, 135 L. Ed. 2d at 257. In such a case, courts must review extremely carefully the evidence presented in order to determine whether an impermissible racial motive predominated. A determination that a state has relied on race in substantial disregard of customary and traditional districting practices will trigger strict scrutiny, though strict scrutiny does not apply merely because redistricting is performed with consciousness of race. *Id.* Plaintiffs may show that race predominated either through direct evidence of legislative intent or through circumstantial evidence, such as the extremely contorted nature of a district's shape and its racial demographics. *Shaw II*, 135 L. Ed. 2d at 218-219; *Miller*, 515 U.S. at 916.

The Plaintiffs have presented no direct evidence that the General Assembly's intent was to draw district lines based on race. In contrast to the redistricting plans at issue in North Carolina in *Shaw II*, in Texas in *Bush v. Vera*, and in Georgia in *Miller v. Johnson*, the 1997 Plan was not drawn with an articulated desire to maximize minority voting participation. In order to succeed on summary judgment, the Plaintiffs must therefore present circumstantial evidence that the State not only showed substantial disregard for traditional districting principles, but that the predominant factor in the legislature's decision to act as it did was race.

II.

The State has asserted that several criteria were more important than race in the General Assembly's creation of the 1997 Redistricting Plan. The General Assembly drew the 1997 Plan to remedy the constitutional violations in the 1992 Plan, to preserve North Carolina's partisan balance of six Republicans and six Democrats, and to avoid placing two incumbents in the same district. *See Defendants' Br. in Support of Summary Judgment* at 4-7 ("*Defendants' Br.*"). In order to grant Plaintiffs the relief they seek, they must prove that the state has substantially disregarded these proffered redistricting criteria, as well as other traditional districting criteria, in favor of race. I believe that the Plaintiffs have failed to meet this burden.

First and foremost, the districts at issue here are not majority-minority districts.[1] I find it of utmost importance that only 43.36% of the voting-age population in District 12 is African-American. This fact immediately distinguishes this case from the line of Supreme Court cases that have struck down racial gerrymandering in North Carolina, Florida, Georgia, Louisiana, and Texas -- cases that define the equal protection inquiry in this area. The Court itself recognized this distinction when it recently upheld a Florida state senate district that was not a majority-minority district. *See Lawyer*, 138 L. Ed. 2d at 680 (upholding state senate district with 36.2% black voting-age population); *see also Quilter v. Voinovich*, 66 U.S.L.W. 3639 (U.S. Mar. 30, 1998) (No. 97-988) (affirming decision of three-judge panel that rejected a racial gerrymandering challenge to Ohio legislative districts that were not majority-minority).

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[1] The Supreme Court has not articulated whether a district is designated majority-minority by reference to voting-age population, by reference to overall population, or by reference to voter registration. Voting-age population would seem to be the appropriate benchmark. All people of voting age have the capacity to influence elections, whereas those under voting age obviously cannot. Counting only registered voters would potentially undercount those with the potential to influence elections.

In District 12, 43.36% of the voting-age population is black, while 46.67% of the total population is black. In District 1, 46.57% Of the voting-age population is black, while 50.27% of the total population is black. Under none of the possible criteria, then, can District 12 be considered a majority-minority district. District 1 can only be considered a majority-minority district with reference to total population. *See Defendants' Br.* at 6.

In its racial composition, District 12 is no different from every one of North Carolina's other eleven congressional districts: the majority of the voting-age population in the district is white. While this may not be dispositive of the question whether race was the predominant factor in the legislature's redistricting plan, the fact that all of North Carolina's congressional districts are majority-white at the very least makes the Plaintiffs' burden, which is already quite high, even more onerous. Had the legislature been predominantly influenced by a desire to draw District 12 according to race, I suspect it would have created a district where more than 43% of the voting-age population was black. In part because District 12 is not a majority-minority district, I find no reason to credit the Plaintiffs' contention that race was the predominant factor in the legislature's decisions. This is especially true considering that the legislature has proffered several compelling, non-racial factors for its decision.

Second, this case is readily distinguishable from previous racial gerrymandering case because the plan at issue is not the result of North Carolina's acquiescence to pressure from the U.S. Justice Department, acting under its Voting Rights Act preclearance authority. In previous cases in which the Court struck down challenged districts, the legislatures drew the challenged plans after their initial plans had been denied preclearance by the Department of Justice under its "black-maximization" policy. *See Miller*, 515 U.S. at 921. For example, in *Miller*, the Court found that the creation of the unconstitutional district was in direct response to having had two previous plans denied preclearance by the Justice Department. *See id.* ("There is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-minority district to satisfy the Justice Department's preclearance demands."). In *Shaw II*, the Court recognized that North Carolina decided to draw two majority-minority districts in response to the Justice Department's denial of preclearance to a previous plan. *Shaw II*, 135 L. Ed. 2d at 219 (noting that the "*overriding* purpose [of the redistricting plan] was to comply with the dictates of the Attorney General's Dec. 18, 1991 letter [denying preclearance to previous plan] and to create two congressional districts with effective black voting majorities") (quotation omitted).

In contrast, while the Department of Justice granted preclearance to the plan at issue in this case, the Department did not engage in the kind of browbeating that the Supreme Court has found offensive in previous racial gerrymandering cases. In the cases I have cited, the Court relied on this direct evidence, that the legislature was primarily motivated by race, to invoke strict scrutiny of the challenged districts. Unlike those cases, Plaintiffs have proffered neither direct nor circumstantial evidence that the General Assembly was pressured by the Department of Justice to maximize minority participation when it redrew the congressional districts in 1997. In the absence of such evidence, I have little reason to believe that the State is less than candid in its averments to this court that race

was not the predominant factor used by the legislature when crafting the 1997 redistricting plan.

In reaching its decision, the majority has relied heavily on evidence that District 12 could have been drawn to include more precincts where a majority of registered voters are Democrats, but that it was not so drawn, presumably for reasons that can be predominantly explained on no other basis but race. I cannot agree with the majority's interpretation of the evidence. The Plaintiffs, and the majority opinion, provide anecdotal evidence that certain precincts that border District 12, but were not included in that district, have a high number of voters that are registered Democrats. *See supra* at 8-9. This evidence does not take into account, however, that voters often do not vote in accordance with their registered party affiliation. The State has argued, and I see no reason to discredit their uncontroverted assertions, that the district lines were drawn based on votes for Democratic candidates in *actual elections*, rather than the number of registered voters. *See* Affidavit of Senator Roy A. Cooper, III ("Cooper Aff.") ¶8 ("election results were the principal factor which determined the location and configuration of all districts").

The majority's evidence also ignores the simple fact that the redistricting plan must comply with the equal protection principle of "one person, one vote." Every voter must go somewhere, yet all districts must remain relatively equal in population. Plaintiffs' anecdotal evidence suggests that Democratic precincts could have been included in District 12 in certain areas, had the district only been enlarged to include those places. By necessity, however, the district would need to have been reduced in size in other places in order to accommodate the increase in the overall population in the district. Had the State drawn the lines in the manner that Plaintiffs' evidence implies it should have, it appears that the State simply would have traded a Democratic precinct in one part of the district for a Democratic precinct in another part. Perhaps such line-drawing would have satisfied the Plaintiffs' desire that District 12 contain more than a 57% white majority, but I do not agree with the majority that the Constitution requires it.

In contrast to Plaintiffs' anecdotal evidence (which is presented in an affidavit by Plaintiffs' counsel), the State has presented far more convincing evidence that race was not the predominant factor in the General Assembly's decision to draw District 12 as it has been drawn. *See* Affidavit of Dr. David W. Peterson ("Peterson Aff."). In his statistical analysis, Professor Peterson traveled the entire circumference of District 12, looking at both the party affiliation and racial composition of the precincts on either side of the district line. Based on an analysis of the entire district, Professor Peterson concluded that "the path taken by the boundary of the Twelfth District can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations." Peterson Aff. ¶3. In other words, examining the entire circumference of District 12, rather than relying on Plaintiffs' "pick and choose" examples, there is no statistical evidence to support the conclusion that race was the General Assembly's primary motive in drawing District 12.

Furthermore, the majority sees fit to ignore evidence demonstrating that not only did the legislature utilize traditional race-neutral districting principles in drawing the Twelfth District's lines, but that these principles predominated over any racial considerations. According to the Supreme Court, these "race-neutral" principles include, but are not limited to: compactness, contiguity, respect for political subdivisions or communities of interest, and incumbency protection. *See Bush v. Vera*, 135 L. Ed. 2d at 260; *Miller*, 515 U.S. at 916. The majority would apparently add "geographical integrity" to this list, although I am not clear what exactly they mean by that.[2] *See supra* at 22. Regardless of what is included on the list, however, the fact remains that the legislature relied more heavily on these neutral principles than on race when it chose the boundaries of District 12.

The compactness of District 12 is, admittedly, substantially less than what has been deemed to be "ideal" and is the least compact of all of North Carolina's twelve congressional districts. *See supra* at 11 (citing Pildes & Niemi "compactness factors"). Some district, however, must inevitably be the least compact; that fact alone therefore is not dispositive. And because District 12 reflects the paths of major interstate highway corridors which make travel within the district extremely easy, it has a type of "functional compactness" that is not necessarily reflected by the Pildes & Niemi factors. In addition, District 12 as it currently stands is contiguous. Contrary to the majority's allusions to "narrow corridors," *see supra* at 7, the width of the district is roughly equal throughout its length, *see* Affidavit of Dr. Gerald R. Webster tbl. 1.

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[2] The term "geographical integrity" does not appear in any of the Supreme Court's voting rights cases, and the only lower court case that expressly uses the term, *DeWitt v. Wilson*, 856 F. Supp. 1409, 1411 (E.D. Cal. 1994), did so only because it was a standard set out in the state's constitution.

District 12 also was designed to join a clearly defined "community of interest" that has sprung up among the inner-cities and along the more urban areas abutting the interstate highways that are the backbone of the district. I do not see how anyone can argue that the citizens of, for example, the inner-city of Charlotte do not have more in common with citizens of the inner-cities of Statesville and Winston-Salem than with their fellow Mecklenburg county citizens who happen to reside in suburban or rural areas.

The tricky business of drawing borders to protect incumbents also required the legislature to draw District 12 in the way it did. District 12 had to be drawn in a manner that avoided placing both Congressman Burr's and Coble's residences inside the district, excluded Cabarrus County, where Congressman Hefner resides, and still provided enough Democratic votes to protect incumbent Congressman Watt's seat. *See* Cooper Aff. ¶10.

What I find to be the predominating factors in drawing the 1997 Plan, however, were the legislature's desire to maintain the 6-6 partisan balance in the House and to protect incumbents. *See* Cooper Aff. ¶ 8 (stating maintaining partisan balance was the principal factor driving redistricting). These

are legitimate interests which have been upheld by the Supreme Court in previous voting rights cases, *see, e.g., Bush v. Vera*, 135 L. Ed. 2d at 260-61, and were proper concerns for the legislature here. As I noted before, the majority's decision to look only at the percentage of registered Democrats in analyzing the district's borders ignores the fact that registered Democrats are not compelled to vote for Democratic candidates and often do not. In drawing District 12, therefore, the legislature did not consider merely the number of registered Democrats, rather it looked also to the history of recent voting patterns in an attempt to design the districts to ensure that the partisan balance would remain stable. *See* Cooper Aff. ¶ 8; Peterson Aff. ¶ 21.

Finally, I find it highly unlikely, as the majority has found today, that the General Assembly acted with predominantly racial motives in its drawing of District 12, but did not act with the same motive in its drawing of District 1. The General Assembly considered the 1997 Redistricting Plan as a single, statewide proposal, and it makes little sense to me that the General Assembly would have been animated by predominantly racial motives with respect to the Twelfth District and not the First. This inconsistency is even more apparent when one considers that the legislature placed *more* African-Americans in District 1 (46.54% of the voting-age population) than in District 12. Since we all agree that the Plaintiffs have failed to prove any equal protection violation with respect to the legislature's decision in drawing District 1, I find it unlikely that Plaintiffs' proof would demonstrate otherwise with regard to other aspects of the same redistricting plan.

III.

Not only do I disagree with the majority in their holding the Twelfth District unconstitutional, I believe that -- even if the Twelfth District is unconstitutional -- they are in error in enjoining the current election process, which is already substantially underway. The rationale for allowing elections to proceed after a court has declared them to be constitutionally infirm has been clearly articulated by the Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 585 (1964):

> [O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Weighing the equities here, it is clear that this is one of the "unusual" cases contemplated by *Reynolds v. Sims* and therefore an injunction should not be issued at this point in the election cycle.

On January 30, 1998, when the Plaintiffs filed their motion for a preliminary injunction to these elections, the deadline for candidates to file for the primary elections was only four days away. Voters had already contributed over $3 million to the congressional candidates of their choice, and the candidates themselves had spent approximately $1.5 million on their campaigns. *See* Second Affidavit of Gary O. Bartlett ("Bartlett Second Aff.") ¶ 14 (giving figures for the period from July 1 to December 31, 1997). Ballots have already been prepared, printed, and distributed. Absentee balloting for the primary elections began on March 16, 1998 and undoubtedly some voters have already cast their votes. The primary elections themselves are scheduled for May 5, only a few short weeks away. This court's injunction therefore wreaks havoc on an electoral process that is in full swing.

An injunction puts the North Carolina legislature on the horns of a dilemma. It may choose to run the May 1998 elections as scheduled for everything but the congressional primaries, and then spend millions of dollars scheduling a separate election for the congressional primaries[3] -- an election for which few people are likely to make a special trip to the election booth. Or the State may decide to spend millions of dollars to reschedule the entire May election and affect hundreds of races for offices throughout the State. Forcing the State to choose between these two equally unpalatable choices is unreasonable.

In addition, the injunction will disrupt candidates' campaigning and voter contributions to those campaigns. Redrawing the Twelfth District's boundaries will inevitably change the boundaries of the surrounding districts, and the ripple effects of this redrawing may well affect many other districts in the State, as happened when the 1997 Plan supplanted the 1992 Plan. Congressional candidates cannot be certain whom they will represent or who their opponents will be until the districts are redrawn. Voters likewise will be unsure whether the candidates of their choice will end up in their district. Not only will contributions to candidates and campaigning by candidates be slowed, if not halted, while the redistricting takes place, but once the redistricting is completed, candidates and voters will have scant time to become acquainted with each other before elections take place. *See*

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[3] The cost of a single, statewide election, primary or general, is said to be $4,300,000. *See* Bartlett Second Aff. ¶ 13.

McKee v. James, CV-97-C-2078-W (N.D. Ala. March 24, 1998) (refusing to enjoin elections even though qualifying date for primary had not yet passed because "[s]ome energy is already invested; some persons have declared their candidacy to represent a certain districts. . . Even if redistricting were carried out today, it would disturb the expectations of candidates and their supporters, and it would disrupt the state's conduct of the primaries."); *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996) (refusing to issue injunction six weeks before general election when "[c]andidates have already spent significant time and money campaigning, and voters have begun to familiarize themselves with the candidates" because delay would disrupt elections unnecessarily and confuse voters). *Accord Vera v. Richards*, 861 F. Supp. 1304, 1351 (S.D. Tex. 1994), *affirmed sub nom. Bush v. Vera*, 135 L. Ed. 2d 245 (1996) (finding congressional districts unconstitutional eleven weeks before general elections but allowing them to proceed under unconstitutional apportionment plan). This will negatively affect the quality of the representation that citizens of North Carolina receive in Congress, and counsels against upsetting the current elections.

IV.

In its opinion, the majority concludes that neither the Plaintiffs nor the State has established the absence of a genuine issue of material fact that would entitle either party to judgment as a matter of law. *See supra* at 22-23. I believe that all material facts concerning the First District are uncontroverted -- this panel received the same evidence concerning District 1 as it did for District 12. If summary judgment is appropriate for District 12. I see no reason why District 1's constitutionality cannot be decided on summary judgment as well. The majority is simply wrong to require the State to establish the absence of an issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) ("[W]e do not think . . . that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact. . . ."). Because I believe that the Plaintiffs have failed to demonstrate that the First Congressional District under the 1997 Congressional Restricting [sic] Plan is an unconstitutional classification based on race, I would grant the State's motion for summary judgment.

V.

I agree with the majority that Plaintiffs have failed to meet their burden on summary judgment as to District 1, although I would go further and grant the State's motion for summary judgment as to this district. I dissent from the majority's decision granting the Plaintiffs' motion for summary judgment on District 12, and enjoining elections under the 1997 Plan. For the reasons stated above, I would grant the State's motion for summary judgment, finding that Plaintiffs have not proven a violation of their right to equal protection of the laws.

***SHAW*, SECOND AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION, JULY 9, 1996**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, MELVIN G. SHIMM,)
ROBINSON O. EVERETT, JAMES M.)
EVERETT, DOROTHY G. BULLOCK,)
MARTIN CROMARTIE, THOMAS)
CHANDLER MUSE, and GLENNES)
DODGE WEEKS,)
)
Plaintiffs,)
)
JAIVES ARTHUR "ART" POPE,)
BETTY S. JUSTICE, DORIS LIL, JOYCE)
LAWING, NAT SWANSON, RICK)
WOODRUFF, J. RALPH HIXSON,)
AUDREY McBANE, SIM DELAPP, JR.,)
RICHARD SAHLIE, HOWARD B.)
SMITH, H.M. "TED" TYLER, FERRELL)
L. BLOUNT, III, H. HOWARD)
DANIELEY, ANTHONY G. POSEY,)
and RACHEL NANCE RUMLEY)
)
Plaintiff-Intervenors,)
)

v.)
)
GOVERNOR JAMES B. HUNT, in his)
official capacity as Governor of the State of)
North Carolina; DENNIS A. WICKER, in)
his official capacity as Lieutenant Governor)
of the State of North Carolina and President)
of the Senate; HAROLD J. BRUBAKER,)
in his official capacity as Speaker of the)
North Carolina House of Representatives;)
JANICE FAULKNER, in her official)
capacity as Secretary of the State of)
North Carolina; THE NORTH CAROLINA)
STATE BOARD OF ELECTIONS,)
an official agency of the State of North)
Carolina; EDWARD J. HIGH, in his)
official capacity as Chairman of the North)
Carolina State Board of Elections; JEAN H.)
NELSON, LARRY LEAKE, DOROTHY)
(DOT) PRESSER, and JUNE K.)
YOUNGBLOOD, in their official capacities)
as members of the North Carolina State)
Board of Elections,)
)
Defendants,)
)
RALPH GINGLES, VIRGINIA)
NEWELL, GEORGE SIMKINS, N.A.)
SMITH, RON LEEPER, ALFRED)
SMALLWOOD, DR. OSCAR BLANKS,)

REV. DAVID MOORE, ROBERT L.)
DAVIS, C.R. WARD, JERRY ADAMS,)
JAN VALDER, BERNARD OFFERMAN,)
JENNIFER McGOVERN, CHARLES)
LAMBETH, ELLEN EMERSON,)
LAVONIA ALLISON, GEORGE)
KNIGHT, LETO COPELEY, WOODY)
CONNETTE, ROBERTA WADDLE and)
WILLIAM M. HODGES,)
)
Defendant-)
Intervenors.)
)
)

SECOND AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION

Plaintiffs and plaintiff-intervenors file this Second Amended Complaint in the above-captioned action for declaratory and preliminary and permanent injunctive relief against the defendants to challenge and prevent further implementation of the State of North Carolina's redistricting statute. This action is based on the claim originally filed by the plaintiffs on March 12, 1992, upheld by the Supreme Court in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), and in *Shaw v. Hunt*, 1996 U.S. LEXIS 3880 (U.S. June, 13, 1996).

JURISDICTION AND VENUE

1. This action arises under Article I, §§ 2 and 4 and the Fourteenth and Fifteenth Amendments of the Constitution of the United States, 42 U.S.C. §§ 1981, 1983, and 1988, and 2 U.S.C. § 2.

2. This court has original jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), and 2284.

3. Venue is proper in this district under 28 U.S.C. § 1391(b).

THREE-JUDGE DISTRICT COURT

4. A three-judge district court has been properly convened in this action under 28 U.S.C. § 2284 because this action challenges the constitutionality of the statewide apportionment of congressional districts for the State of North Carolina.

5. Plaintiffs and plaintiff-intervenors allege that the North Carolina legislature purposely and intentionally classified and discriminated among the voters of North Carolina on the basis of race and in doing so violated the rights of the plaintiffs and plaintiff-intervenors guaranteed by the Fourteenth and Fifteenth Amendments. The defendants have enforced this unconstitutional law against the plaintiffs and plaintiff-intervenors and all of the citizens of North Carolina.

6. The Supreme Court concluded in *Shaw v. Hunt*, 1996 U.S. LEXIS 3880 (U.S. June 13, 1996), that the North Carolina redistricting statute, and in particular the Twelfth District, is constitutionally invalid. This action seeks a declaration that the First District is also constitutionally invalid. This action also seeks a preliminary and permanent injunction against enforcement of the redistricting statute for the 1996 election, and other equitable relief as the court deems appropriate.

PARTIES

7. Plaintiff Ruth O. Shaw is a registered voter and a resident of the Twelfth Congressional District of the State of North Carolina. She is a resident of Durham County. The North Carolina redistricting statute harms Ms. Shaw because it classifies her and other registered voters in District Twelve on the basis of race, and she has been classified in, or excluded from, particular congressional districts on the basis of race.

8. Plaintiff Melvin G. Shimm is a registered voter and a resident of the Twelfth Congressional District of the State of North Carolina. He is a resident of Durham County. The North Carolina redistricting statute harms Mr. Shimm because it classifies him and other registered voters in District Twelve on the basis of race, and he has been classified in, or excluded from, particular congressional districts on the basis of race.

9. Plaintiff Robinson O. Everett is a registered voter and a resident of the Second Congressional District of the State of North Carolina. He is a resident of Durham County. The North Carolina redistricting statute harms Mr. Everett because it classifies him and other registered voters in District Two on the basis of race, and he has been classified in, or excluded from, particular congressional districts on the basis of race.

10. Dorothy G. Bullock is a registered voter and a resident of the Second Congressional District of the State of

North Carolina. She is a resident of Durham County. The North Carolina redistricting statute harms Ms. Bullock because it classifies her and other registered voters in District Two on the basis of race, and she has been classified in, or excluded from, particular congressional districts on the basis of race.

11. Plaintiff James M. Everett registered to vote after the 1992 redistricting statute had been adopted in North Carolina and is currently a registered voter in the Second Congressional District. He is a resident of Durham County. The North Carolina redistricting statute harms Mr. Everett because it classifies him and other registered voters in District Two on the basis of race.

12. Plaintiff-intervenor James Arthur "Art" Pope was and is a registered voter and resident of Wake County and a member of the Republican Party. As a result of the 1992 redistricting statute, Mr. Pope was placed in the Fourth Congressional District. Plaintiff-intervenor Betty S. Justice was and is a resident of Rutherford County and a member of the Republican Party. As a result of the 1992 redistricting statute, Ms. Justice was placed in the Tenth Congressional District. The North Carolina redistricting statute harms Mr. Pope and Ms. Justice because it classifies them and other registered voters on the basis of race, and they have been included in, or excluded from, particular congressional districts on the basis of race.

13. Plaintiff-intervenor Doris Lil was and is a resident of Lincoln County and a member of the Republican party. As a result of the 1992 redistricting, Ms. Lil now resides in the Tenth Congressional District. Plaintiff-intervenor Joyce Lawing was and is a resident of Caldwell County and a member of the Republican party. As a result of the 1992 redistricting, Ms. Lawing now resides in the Tenth Congressional District. The North Carolina redistricting statute harms Ms. Lil and Ms. Lawing because it classifies them and other registered voters on the basis of race, and they have been included in, or excluded from, particular congressional districts on the basis of race.

14. Plaintiff-intervenor Nat Swanson was and is a resident of Forsyth County and a member of the Republican party. As a result of the 1992 redistricting, Mr. Swanson now resides in the Tenth Congressional District. Plaintiff-intervenor Rick Woodruff was and is a resident of Wilkes County and a member of the Republican party. As a result of the 1992 redistricting, Mr. Woodruff now resides in the Tenth Congressional District. The North Carolina redistricting statute harms Mr. Swanson and Mr. Woodruff because it classifies them and other registered voters on the basis of race, and they have been included in, or excluded from, particular congressional districts on the basis of race.

15. Plaintiff-intervenor J. Ralph Hixson was and is a resident of Guilford County and a member of the Republican party. As a result of the 1992 redistricting, Mr. Hixson now resides in the Sixth Congressional District. Plaintiff-intervenor Audrey McBane was and is a resident of Alamance County and a member of the Republican party. As a result of the 1992 redistricting, Ms. McBane now resides in the Sixth Congressional District. The North Carolina redistricting statute harms Mr. Hixson and Ms. McBane because it classifies them and other registered voters on the basis of race, and they have

been included in, or excluded from, particular congressional districts on the basis of race.

16. Plaintiff-intervenor Sim Delapp, Jr. was and is a resident of Davidson County and a member of the Republican party. As a result of the 1992 redistricting, Mr. Delapp now resides in the Sixth Congressional District. Plaintiff-intervenor Richard Sahlie was and is a resident of Mecklenburg County and a member of the Republican party. As a result of the 1992 redistricting, Mr. Sahlie now resides in the Ninth Congressional District. The North Carolina redistricting statute harms Mr. Delapp and Mr. Sahlie because it classifies them and other registered voters on the basis of race, and they have been included in, or excluded from, particular congressional districts on the basis of race.

17. Plaintiff-intervenor Howard B. Smith is a registered voter, a Republican, and a resident of the First Congressional District of the State of North Carolina. He is a resident of Warren County. Prior to the 1992 congressional redistricting, Mr. Smith was registered to vote in the Second Congressional District. Mr. Smith is also the Republican Party chairman of the First District. The North Carolina redistricting statute harms Mr. Smith because it classifies him and other registered voters in District 1 on the basis of race, and he has been included in, or excluded from, particular congressional districts on the basis of race.

18. Plaintiff-intervenor H.M. "Ted" Tyler is a registered voter, a resident of Northhampton County, and a member of the Republican Party. Prior to the 1992 congressional redistricting, Mr. Tyler was registered to vote in the First Congressional District. As a result of the 1992

redistricting, Mr. Tyler now resides in the First Congressional District. Mr. Tyler is the current nominee for the Republican Party for the House of Representatives from the First District. Mr. Tyler is injured because he and other North Carolina voters, including voters in District 1, have been classified by race and have been included in, or excluded from, particular congressional districts on the basis of race.

19. Plaintiff-intervenor Ferrell L. Blount, III is a registered voter, a resident of Pitt County, and a member of the Republican Party. Prior to the 1992 congressional redistricting, Mr. Blount was a registered voter in the First Congressional District. As a result of the 1992 redistricting, Mr. Blount now resides in the First Congressional District. Mr. Blount is injured because he and other North Carolina voters, including voters in District 1, have been classified by race and have been included in, or excluded from, particular congressional districts on the basis of race.

20. Plaintiff-intervenor H. Howard Danieley is a registered voter, a resident of Alamance County, and a member of the Republican Party. Prior to the 1992 congressional redistricting, Mr. Danieley was registered to vote in the Sixth Congressional District. As a result of the 1992 redistricting, Mr. Danieley now resides in the Twelfth Congressional District. Mr. Danieley is injured because he and other North Carolina voters, including voters in District 12, have been classified by race and have been included in, or excluded from, particular congressional districts on the basis of race.

21. Plaintiff-intervenor Anthony G. Posey is a registered voter, a resident of Guilford County, and a member of the Republican Party. Prior to the 1992 congressional

redistricting, Mr. Posey was registered to vote in the Sixth Congressional District. As a result of the 1992 redistricting, Mr. Posey now resides in the Twelfth Congressional District. Mr. Posey is injured because he and other North Carolina voters, including voters in District 12, have been classified by race and have been included in, or excluded from, particular congressional districts on the basis of race.

22. Plaintiff-intervenor Rachel Nance Rumley is a registered voter, a resident of Guilford County, and a member of the Republican Party. Prior to the 1992 congressional redistricting, Ms. Rumley was registered to vote in the Sixth Congressional District. As a result of the 1992 redistricting, Ms. Rumley now resides in the Twelfth Congressional District. Ms. Rumley is injured because she and other North Carolina voters, including voters in District 12, have been classified by race and have been included in, or excluded from, particular congressional districts on the basis of race.

23. As part of the manipulation of 229,000 census blocks, each plaintiff was assigned to his or her current congressional district and personally subjected to a racial classification. Each was personally injured by being placed in a district which was dysfunctional because it was not drawn according to traditional and accepted race-neutral principles such as geographic compactness, contiguousness, and communities of interest. Such principles facilitate political interaction and political representation.

24. Defendant James B. Hunt is the Governor in and for the State of North Carolina and, in such capacity, he is the Chief Executive Officer of the State charged with the duty of enforcing compliance with State legislation under Article II, Section 5(4) of the Constitution of North Carolina. Moreover, it is the Governor's's duty to issue a commission to a person elected to the United States House of Representatives upon that person's production to the Governor a certificate of his election from the Secretary of State, pursuant to N.C. Gen. Stat. § 163-194. He is sued in his official capacity.

25. Defendant Dennis A. Wicker is the Lieutenant Governor of North Carolina and, as part of his official duties, presides over the North Carolina Senate and certifies certain actions of the Senate. He is sued in his official capacity.

26. Defendant Harold J. Brubaker, is the Speaker of the North Carolina House of Representatives. In this capacity he presides over that body and certifies certain actions taken by the House of Representatives. He is sued in his official capacity.

27. Defendant Janice Faulkner, Secretary of State of North Carolina, is charged with preparing a certificate of election for each person elected after the Board of Elections certifies the results to her, pursuant to N.C. Gen. Stat. § 163-193. She is sued in her official capacity.

28. Defendant North Carolina State Board of Elections is an official agency of the State of North Carolina and has general supervisory authority over the primaries and elections in North Carolina, including elections for the U.S. House of Representatives, with the authority to promulgate rules and regulations for the conduct of elections, pursuant to N.C. Gen. Stat. §163-22.

29. Defendants Edward J. High, Jean H. Nelson, Larry Leake, Dorothy (Dot) Presser, and Jean K. Youngblood are members of the North Carolina Board of Elections.

Defendant Edward J. High is the Chairman of the Board. All of said defendants are charged with exercising the powers and duties of the State Board of Elections pursuant to N.C. Gen. Stat. § 163-22. These defendants are all sued in their official capacity.

30. Pursuant to this court's order of September 7, 1993, Ralph Gingles, Virginia Newell, George Simkins, N.A. Smith, Ron Leeper, Alfred Smallwood, Dr. Oscar Blanks, Rev. David Moore, Robert L. Davis, C.R. Ward, Jerry Adams, Jan Valder, Bernard Offerman, Jennifer McGovern, Charles Lambeth, Ellen Emerson, Lavonia Allison, George Knight, Leto Copeley, Woody Connetts, Roberta Waddle, and William M. Hodges were permitted to participate in this action as defendant-intervenors.

1992 CONGRESSIONAL REDISTRICTING

31. Pursuant to the results of the 1980 decennial census, the State of North Carolina was entitled to eleven members in the United States House of Representatives. Because of the substantial population increase recorded by the 1990 decennial census, North Carolina is now entitled to an additional member in the United States House of Representatives. Thus, the size of the State's Congressional delegation has increased from eleven to twelve members pursuant to 2 U.S.C. § 2.

32. The increase in the size of the State's population and Congressional delegation required the State of North Carolina to redistrict the State's Congressional districts, so that each of the twelve Congressional Districts would have equality in population. To this end, on July 9, 1991, the General Assembly enacted redistricting legislation known as Chapter 601 of the North Carolina Sessions Laws of 1991 ("Chapter 601").

33. Because portions of the State of North Carolina are subject to the pre-clearance procedures of § 5 of the Voting Rights Act, Chapter 601 could not take effect and was unenforceable, unless and until the Attorney General of the United States pre-cleared Chapter 601 or failed to object to the Chapter 601 within a prescribed time after its submission to him.

34. The State of North Carolina submitted Chapter 601 to the Attorney General for pre-clearance pursuant to the Voting Rights Act.

35. On December 18, 1991, the Attorney General, acting through his subordinate in the United States Department of Justice, objected to Chapter 601 and refused pre-clearance. The basis for denying pre-clearance was that North Carolina had failed to create two congressional districts containing a majority of minorities and voters in order to better assure that in each district an African-American person would be elected to Congress. By denying pre-clearance on this basis, the Attorney General exceeded any authority he was entitled to exercise under any constitutionally proper interpretation of the Voting Rights Act, as has now been decided by the Supreme Court in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), and *Shaw v. Hunt, supra.*

36. Because of the objection that had been made by the Attorney General, the General Assembly of North Carolina, convened in special session and enacted Chapter 7 (1991 Extra

Session) (hereinafter "Chapter 7"), which provides for the redistricting of congressional districts and an increase from eleven to twelve congressional districts.

37. In enacting Chapter 7, race was the predominant motive of the General Assembly in placing a significant number of voters within or without particular districts, as was reflected in its own record of proceedings and otherwise. Indeed, the U.S. Supreme Court already has concluded that race was the predominant factor motivating the General Assembly's decision to place a significant number of voters within or without the Twelfth District. *See Shaw v. Hunt, supra.* Notably, the drafters of the plan relied upon computer technology to group 229,000 census blocks in accord with race, so that census blocks with a predominately black population would be clustered together and these clusters would be connected with strings of census blocks with a predominately white population. Thus, the drafters could create an Afiican-American majority in two districts, and the election of an African-American representative could be assured in these districts. No socioeconomic data other than race and age of population was available in the computer base for use in drawing the districts.

38. In Chapter 601, the First Congressional District had been drawn with the predominant and overriding purpose of creating a majority-black district and racially neutral and traditional redistricting principles were subordinated to this purpose and motive. In Chapter 7, the same purpose existed but the First District was even more "bizarre" and was formed with an ever greater disregard of neutral and traditional redistricting principles. It contained "double crossovers", reached from the Virginia line almost to South Carolina, split many counties, cities and towns, and precincts, and used corridors of white "filler people" to connect concentrations of African-Americans in the center of Fayetteville, Wilmington, Greenville and other towns with predominately African-American rural areas.

39. Chapter 7 was submitted to the Attorney General for pre-clearance. The Attorney General entered no objection to Chapter 7.

40. Subsequently, on February 28, 1992, an action was filed against State officials by various plaintiffs objecting to Chapter 7 on several grounds. (See *Pope et al. v. Blue et al.*, Civil Action No. 3:92CV71-P, United States District Court, Western District of North Carolina, Charlotte Division.) Those grounds are distinct from the basis for this action. The present plaintiffs in no way adopt or incorporate the contentions made by the plaintiffs in that action, which was dismissed.

41. Initially, the three-judge district court granted defendants' motion to dismiss plaintiffs' complaint. *See Shaw v. Barr*, 808 F.Supp. 461 (E.D.N.C. 1992). The plaintiffs appealed to the Supreme Court.

42. On June 28, 1993, the Supreme Court reversed the district court, and remanded for further proceedings in light of its decision. *See Shaw v. Reno*, 113 S.Ct. 2816 (1993).

43. On November 3, 1993, the court granted in part and denied in part plaintiff-intervenors' motion to intervene pursuant, *inter alia*, to Rule 24(b) of the Federal Rules of Civil Procedure. The court granted the motion of those Republican applicants who were registered voters of the State of North Carolina for permission to intervene. The court denied the

motion of those Republican applicants who were not registered voters of the State of North Carolina for permission to intervene pursuant to Fed. R. Civ. P. 24(b), i.e., the Republican Party of North Carolina and Jack Hawke, in his official capacity as the Chairman of the Party.

44. Discovery commenced and a trial was held.

45. On August 1, 1994, a three judge district court entered its judgment upholding the North Carolina redistricting statute and rejecting plaintiffs and plaintiff-intervenors' challenge to Chapter 7 pursuant to the Equal Protection Clause of the Fourteenth Amendment. *See Shaw v. Hunt*, 861 F.Supp. 408 (E.D.N.C. 1994). Chief Judge Voorhees dissented.

46. The plaintiffs and plaintiff-intervenors filed timely appeals to the United States Supreme Court. On June 13, 1996, the United States Supreme Court held "that the North Carolina [congressional distracting] plan . . . violate[s] the Equal Protection Clause because the State's reapportionment scheme is not narrowly tailored to serve compelling state interest." *Shaw v. Hunt*, slip op. at 1.

47. In reaching this conclusion, the court held that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without District 12. *See* slip op. at 5-6. The Supreme Court noted that the district court had direct evidence of legislature's objective as well as indirect evidence based upon the district's shape and demographics. "Here, as in *Miller*, we fail to see how the district court could have reached any conclusion other than that race was the predominant factor in drawing [the challenged district]." *See* slip op. at 6 (quotations omitted). Accordingly, North Carolina, "therefore, must show not only

that its redistricting plan was in pursuit of a compelling State interest, but also that its districting legislation is narrowly tailored to achieve [that] compelling interest." Slip op. at 8. (quotations omitted).

48. The Supreme Court then assessed and rejected defendants' claims that three separate compelling state interests justified District 12: to eradicate the effects of past and present discrimination; to comply with Section 5 of the Voting Rights Act; and to comply with Section 2 of that Act.

COUNT I

49. The preceding allegations of this complaint are incorporated by reference and realleged.

50. The plaintiffs and plaintiff-intervenors, as citizens and residents of the State of North Carolina, are part of its "people"; and as registered voters in the State, they have, under Article I, § 2 of the Constitution, a right to choose members of Congress. Under Article 1, § 4, this right is subject to control by Congress and the federal government only to a limited extent and not in the manner in which the Attorney General has interpreted the Voting Rights Act.

51. The right of the plaintiffs and plaintiff-intervenors to vote for members of the House of Representatives is a right for which the plaintiffs and plaintiff-intervenors are entitled to the "equal protection of the laws", with respect to any action taken by the State of North Carolina. Moreover, this right to vote for members of the House of Representatives of the United States is a "privilege" of citizens of the United States within the meaning of the Fourteenth

Amendment and is protected by that amendment from being abridged by the State of North Carolina. The right of the plaintiffs and plaintiff-intervenors as citizens of the United States to vote for members of the House of Representatives is also protected by the Fifteenth Amendment against being "abridged" by the State of North Carolina on account of the race or color of the plaintiffs and plaintiff-intervenors.

52. Any action by officers of the State of North Carolina which discriminates on the basis of race or color violates this right of plaintiffs and plaintiff-intervenors to vote for members of Congress, denies the plaintiffs and plaintiff-intervenors and all other voters equal protection of the laws, and abridges their right to vote.

53. By submitting to the unconstitutional requirements imposed by the Attorney General, and acquiescing in the creation of race-based congressional districts intended to concentrate voters of a particular race and to elect members of Congress of a particular race, the General Assembly of North Carolina, in 1992, became a necessary participant in creating a racially discriminatory voting process for the election of members of Congress from North Carolina. The present defendants, as part of their official duties, implement and execute this unconstitutional action of the General Assembly.

54. By their acts done in submission to the requirements imposed by the Attorney General, the defendants have heretofore violated, and, unless preliminarily and permanently enjoined, will in the immediate future inevitably violate rights conferred upon these plaintiffs and plaintiff-intervenors by Article I, §§ 2 and 4, and by the Fourteenth and Fifteenth Amendments of the United States Constitution.

55. The decision by the General Assembly to create two congressional districts in which a majority of black voters was concentrated arbitrarily -- without regard to any other considerations, such as geographical compactness, contiguousness, geographical boundaries, or political subdivisions -- was a decision made with full awareness of the intended consequences and effects and was made with the purpose to create congressional districts along racial lines and to ensure that black members of Congress would be elected from two congressional districts in which a majority of black voters were intentionally and purposefully concentrated on the basis of census date reflecting the racial composition of North Carolina's population. Plaintiffs and plaintiff-intervenors allege that, for purposes of the Fourteenth and Fifteenth Amendments to the United States Constitution, this intent and purpose on the part of the members of the General Assembly in North Carolina was and is a racially discriminatory intent and purpose. The overriding and predominantly racial motive requires strict scrutiny which these districts cannot survive because there was no compelling State interest in creating them and they are not narrowly tailored to achieve a compelling state interest. Plaintiffs and plaintiff-intervenors further allege that Chapter 7 -- which creates bizarre, non-contiguous, and extraordinarily dispersed districts, such as the First and Twelfth Districts, and which was enacted as a result of the conscious decision by members of the General Assembly which the various State defendants are now continuing to implement -- is

the result of an unconstitutional and racially discriminatory intent and purpose.

56. The plaintiffs and plaintiff-intervenors will suffer irreparable injury unless the defendants are preliminarily and permanently enjoined from conducting elections according to the district boundaries created by Chapter 7.

57. The plaintiffs and plaintiff-intervenors personally have been harmed by the enactment and enforcement of Chapter 7.

58. The injuries were caused by the enactment and enforcement of this unconstitutional legislation. Their injuries will be redressed by favorable decision from this court preliminarily and permanently enjoining the enforcement of Chapter 7.

WHEREFORE, plaintiffs and plaintiff-intervenors respectfully pray:

1. That the court acknowledge and declare that Chapter 7 violates the Constitution and statutes of the United States and is now prospectively null and void and of no further force and effect insofar as it purports to establish congressional districts for the State of North Carolina;

2. That the court enter a declaratory judgment that the boundaries of District 1 of Chapter 7 reflect a racial gerrymander in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution;

3. That the court preliminarily and permanently enjoin the defendant Secretary of State and other defendants from ordering or conducting any further electoral processes under Chapter 7, from certifying the results of any such processes or elections, and from taking any other steps with

respect to the election of members of the United States House of Representatives, until there has been further redistricting of congressional districts which comply with the Constitution and statutes of the United States;

4. That the court enter an order extending the deadline for filing certificates of announcement of candidacy for election to the United States House of Representatives from the State of North Carolina to such time as is necessary to effect relief,

5. The court order appropriate remedies, which could include solicitation or review of proposed legislative redistricting plans from interested parties, promulgation of new legislative redistricting plans by appointment of special masters, or such other means that the court deems appropriate,

6. That the court retain jurisdiction of this action until such time as the congressional redistricting plan is promulgated in accordance with the constitutional and statutory requirements;

7. That the court award plaintiffs and plaintiff-intervenors their costs and reasonable attorneys fees; and

8. That the court enter such other and further relief as may, to the court, seem just and proper.

Respectfully submitted, this the 9th day of July, 1996.

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[Certificate of Service Omitted in Printing]

SHAW, ET AL. V. HUNT, ET AL., CA NO. 92-202-CIV-5-BR, PLAINTIFFS' RESPONSE TO ORDER OF JUNE 9, 1997, JUNE 19, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
GOVERNOR JAMES B. HUNT, in his official)
capacity as Governor of the State of North)
Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

RESPONSE TO ORDER OF JUNE 9, 1997

The Plaintiffs respond as follows to the Court's Order of June 9, 1997, that they and Plaintiff-Intervenors advise the Court whether they intend to claim that the plan precleared by the Department of Justice does not cure constitutional defects in the former plan and, if so, what is the basis for the claim:

1. The original Plaintiffs, as well as the three additional Plaintiffs, believe that the new plan does not adequately cure the constitutional defects in the former plan, which the Supreme Court held to be unconstitutional. *Shaw v. Hunt*, 116 S.Ct. 1894 (1996).

2. Like its predecessor, the new plan was predominately motivated by race, and does not survive "strict scrutiny."

3. The Supreme Court found that in the earlier plan the Twelfth District was not narrowly tailored. Furthermore, a comparison of the new plan's majority-black First District with the majority-black First District of the earlier plan makes clear that the First District in the earlier plan was also race-motivated, not "narrowly tailored," and could have been far more compact and more consistent with "communities of interest."

4. The new plan fragments counties and cities unnecessarily, ignores communities of interest, and remains bizarre in appearance. The differences between the new plan's majority-black Twelfth District and the unconstitutional majority-black Twelfth District of the earlier plan are cosmetic, and the creation of the new Twelfth District was predominately motivated by race.

5. The Twelfth District in the new plan is based on the racially gerrymandered, unconstitutional Twelfth District in the original 1992 plan and the First District in the new plan is based on the racially gerrymandered, unconstitutional First District in the original 1992 plan. Thus, each of these districts improperly relies on the unconstitutional earlier plan and so violates the principles established in *Abrams v. Johnson*, Nos. 95-1425, 95-1460, 1997 U.S. Lexis 3863, which was decided today, June 19, 1997. Likewise, the Twelfth and First Districts in the new plan reflect the continuing efforts of the Department of Justice to interpret and apply sections of the Voting Rights Act in an unconstitutional manner; and also for this reason the new plan violates *Abrams v. Johnson*. The relationship between the new plan and the original plan that was held unconstitutional in *Shaw v. Hunt* is so close that the new plan must be treated as the "fruit of the poisonous tree" and held to be tainted by the violations of equal protection in the earlier plan.

6. By virtue of the changes that have been made by the redistricting plan submitted to this Court on April 1, 1997, none of the original Plaintiffs appear to have standing to challenge the new plan. *United States v. Hays*, 115 S.Ct. 2431 (1995). The additional Plaintiffs do not reside in the Twelfth District as originally constituted, nor in the new Twelfth District.

7. Because of the lack of standing of the Plaintiffs, there appears to be no matter at issue before this Court with respect to the new redistricting plan. Although Plaintiffs

believe and claim that the new plan is unconstitutional, they recognize that due to their lack of standing, any attack on the constitutionality of the new redistricting plan should be undertaken in a separate action maintained by persons who have standing.

WHEREFORE, Plaintiffs pray this Court:

1. That the Court expressly find that the First District, as configured in the earlier plan, was unconstitutional because of the clear absence of narrow-tailoring;

2. That this Court not approve or otherwise rule on the validity of the precleared congressional redistricting plan submitted to it on April 1, 1997; but if it does rule, that it hold the new plan to be unconstitutional;

3. That the Court dismiss this action without prejudice to the right of any person having standing to maintain a separate action attacking the constitutionality of the precleared congressional redistricting plan.

Respectfully submitted this the 19th day of June 1997.

/s/ Robinson 0. Everett
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Shaw, et al. v. Hunt, et al., CA No. 92-202-CIV-5-BR, Order of United States District Court for the Eastern District of North Carolina, September 12, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
GOVERNOR JAMES B. HUNT, in his official)
capacity as Governor of the State of North)
Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

ORDER

For reasons given in the contemporaneously filed Memorandum Opinion, it is ORDERED

1. That the congressional redistricting plan (1997 N.C. Sess. Laws, Ch. 11) submitted by the state defendants to this court for review on April 1, 1997, is hereby APPROVED as having adequately remedied the specific constitutional violation respecting former congressional District 12 that was found by the Supreme Court of the United States in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996);

2. That this court's injunction entered on July 30, 1996, which *inter alia*, prohibited the conduct of further congressional elections pending approval of a remedial redistricting plan is hereby DISSOLVED;

3. That the claim added by amendment to the complaint in this action on July 12, 1996, which challenged on "racial gerrymandering" grounds the creation of former congressional District 1, is hereby DISMISSED, without prejudice, as moot; and

4. Defendants' motion suggesting a schedule and process for approving the state's new congressional redistricting plan is DENIED as moot.

This 12th day of September, 1997.

For the Court: /s/ W. Earl Britt
United States District Judge

SHAW, ET AL. V. HUNT, ET AL., CA NO. 92-202-CIV-5-BR, MEMORANDUM OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, SEPTEMBER 12, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 92-202-CIV-5-BR

RUTH O. SHAW, *et al.*,)
Plaintiffs,)
)
JAMES ARTHUR "ART" POPE, *et al.*,)
Plaintiff-Intervenors,)
v.)
GOVERNOR JAMES B. HUNT, in his official)
capacity as Governor of the State of North)
Carolina, *et al.*,)
Defendants,)
)
RALPH GINGLES, *et al.*,)
Defendant-Intervenors.)

MEMORANDUM OPINION

PER CURIAM:

This matter is before the court upon submission by the state-defendants of a congressional redistricting plan enacted by the General Assembly of North Carolina in compliance with this court's injunctive decree of July 30, 1996. The submission seeks approval of the plan as having adequately remedied the constitutional violation found by the Supreme Court of the United States in *Shaw v. Hunt*, 116 S. Ct. 1894 (1996), and, in consequence, a dissolution of this court's injunction against the conduct of further congressional elections pending that approval.

For reasons that follow, we conclude that the plan does adequately remedy the specific constitutional violation found as to the plaintiffs and plaintiff-intervenors in this case, and on that basis we will enter an order approving the plan to that extent and dissolving the extant injunction.

I.

On June 13, 1996, the Supreme Court of the United States entered its judgment remanding this action for further proceedings by this court in conformity with the Supreme Court's decision that North Carolina's then-extant congressional redistricting plan was unconstitutional because unjustified "racial gerrymandering" in the location and configuration of District 12 violated equal protection rights of some of the named plaintiffs in the action. *Shaw*, 116 S. Ct. at 1899.

Pending receipt of the Supreme Court's mandate which did not issue immediately, this court, on July 12, 1996, granted an unopposed motion by plaintiffs and plaintiff-intervenors to amend the complaint in the action to add new parties and to raise a *Shaw* claim challenge to District 1.

Following receipt of the Supreme Court's mandate and after holding a hearing on the implementation of the required remedy for the constitutional violation, we entered an order on July 30, 1996, that enjoined the state-defendants from conducting any congressional elections under the then existing redistricting plan after the 1996 elections, but allowed the then ongoing electoral process for those elections to proceed to completion. The order referred the development of a proposed remedial plan to the General Assembly of North Carolina for exercise of its primary jurisdiction in the matter, with instructions to enact and submit to this court a proposed remedial plan by April 1, 1997. The order retained jurisdiction in this court to act in default of timely action by the General Assembly, for approval of any plan submitted, and for such further proceedings as might be required.

The General Assembly enacted a proposed remedial plan on March 31, 1997 (1997 N.C. Sess. Laws, Ch. 11) and timely submitted it to this court for approval on April 1, 1997. Contemporaneously, the State submitted the plan for preclearance by the United States Department of Justice pursuant to § 5 of the Voting Rights Act and we deferred action on the plan pending action by the Justice Department. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981).

While preclearance action was pending, we entered an order on May 28, 1997, denying intervention either of right or permissively to a number of African-American voters and associations who sought intervention both to suggest alternative remedial plans and to raise specific vote-dilution challenges under § 2 of the Voting Rights Act to certain districts in the proposed plan. We found no right to intervene under the provisions of Fed. R. Civ. P. 24(a), and declined to exercise our discretion to permit expansion of this action to include new § 2 dilution claims under Fed. R. Civ. P. 24(b).

On June 9, 1997, the Department of Justice precleared the plan pursuant to § 5 of the Voting Rights Act. On that same day, we entered an order directing plaintiffs and plaintiff-intervenors to advise the court by June 19, 1997, whether they intended to object to approval of the plan by this court and, if so, to identify the basis of their objections.

In response, the plaintiffs (both original and added), while asserting protectively the plan's inadequacy, disclaimed standing under the principles of *United States v. Hays*, 515 U.S. 737 (1995), to make any challenge to the plan because, they asserted, none of the original plaintiffs resided in the "new" Twelfth District, nor did any of the added plaintiffs reside in either the original or "new" Twelfth.

Separately responding, the plaintiff-intervenors, reasserting a position previously urged by motion, also declined to make substantive objection to the plan. They contended instead that the action, having been mooted by the legislative action, could only be dismissed without prejudice on that basis.

The state defendants, replying to these separate disclaimers of standing and assertions that the entire action was moot contended (1) that there were both plaintiffs and plaintiff-intervenors with the requisite standing to make substantive challenges to the submitted plan as to both Districts 1 and 12, and (2) that the action was not mooted by virtue of the legislative action. On this basis, they contended that the parties with standing should be required to make such challenges as they could, and that this court was empowered and obligated to exercise its continuing jurisdiction to review the submitted plan to determine whether it remedies the constitutional violation found by the Supreme Court.

II.

We first address the issues presented by the lack-of-standing and mootness positions taken by the plaintiffs and plaintiff-intervenors and disputed by the state defendants, and the consequent declination by the plaintiffs and plaintiff-intervenors to take any substantive position on the adequacy of the proposed remedial plan, then turn to the merits.

1. To the extent the plaintiff-intervenors' contention is that the entire action has been mooted by the legislature's enactment of a remedial plan, thereby depriving this court of jurisdiction even to approve or disapprove the plan and requiring a simple dismissal without prejudice, we reject

the contention. Neither of the Supreme Court decisions relied upon for the proposition supports it; each is inapposite.

In *Louisiana v. Hays*, 116 S. Ct. 2542 (1996), a pending appeal from a three-judge court-ordered redistricting plan was dismissed as moot. In that case, the state legislature had in the interval independently adopted and enacted the plan. This obviously mooted any basis for Supreme Court review of the district court order, whereas here the very matter pending judicial review is the legislative enactment.

In *Johnson v. Northam*, No. TCA 94-40025-MMP, 1996 WL 297280 (N.D. Fla. May 31, 1996), a three-judge court, after hearing the parties on the adequacies of a legislative remedial plan and approving it, then ordered the case "closed with respect to the remedies that have been rendered to correct any constitutional infirmity found" in the challenged plan. *Id.* at *1. Rather than demonstrating that a legislature's enactment and submission of a proposed remedial plan moots the action, the case demonstrates to the contrary the continuing jurisdiction of the court to act in judicial review of the enacted plan before "closing" the case.

We therefore conclude that legislative enactment of the submitted plan did not, by mooting the entire action, deprive this court of its expressly retained jurisdiction to review the plan for approval.

2. Though enactment of the plan submitted has not mooted the entire action, it has effectively mooted the *Shaw*-claim added by amendment to challenge District 1. As we expressly anticipated in deferring consideration of that added claim pending legislative action, the remedial plan significantly reconfigures the area formerly comprising that district, making the claim challenging its former configuration, location, and racial composition moot. Because as to that claim we therefore have no retained approval jurisdiction, it may be dismissed for mootness if the plan is approved as having adequately remedied the specific violation that has been determined as to District 12.

3. Assuming without deciding (the fact being disputed) that--as they assert--none of the plaintiffs resides in "new District 12," any resulting lack of standing on their part to challenge the constitutionality of that particular reconfiguration of districts cannot affect our retained jurisdiction to review the plan for its adequacy to remedy the violation found as to former District 12. We are doubtful that the non-inclusion of successful plaintiffs in any particular reconfigured district that is assumed to be *the* specific remedial district could be thought, because of the *Hays* residence requirement, to deprive them of standing to challenge the remedial plan as inadequate for the purpose at issue. But we need not attempt to decide that quirky problem growing out of the *Hays* standing rule. It suffices for our purposes that, for reasons satisfactory to themselves, the plaintiffs have formally chosen not to raise any substantive challenge to the adequacy of the plan to remedy the specific violation found as to former District 12.

In that circumstance, we may properly approve the plan as having remedied the specific violation found on the simple basis that its adequacy for that purpose has not been challenged by any party to the litigation. Under long-settled judicial redistricting principles, once a state legislature enacts a remedial plan that is then precleared under § 5 of the Voting Rights Act, that plan "will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). That principle simply applies in this particular context the general presumption that, until successfully challenged, state legislative enactments are in conformity with constitutional requirements.

There having been no substantive challenge to the plan by any party to this action, we will therefore approve it as a constitutionally adequate remedy for the specific violation found by the Supreme Court in this case.

4. We close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claims properly before us. Here, that means that we only approve the plan as an adequate remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not--cannot--run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.

III.

For the foregoing reasons, an order will be entered which approves the submitted plan to the extent noted, dissolves the injunction of July 30, 1996 against the conduct of further congressional elections, and dismisses without prejudice, as moot, the claim added by amendment to challenge former congressional District 1.

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DEPOSITION OF JOEL K. BOURNE, (OCTOBER 4, 1999) (SELECTED PORTIONS)

Q. And you are a friend of Martin Cromartie?

A. Yes.

Q. And so far as you know, you didn't--you didn't have any previous acquaintanceship with Mr. Robinson Everett or anybody involved in the original lawsuit?

A. No, no.

Q. Did you keep track of that original lawsuit?

A. Just through my friend Martin Cromartie.

Q. And you talked with him about it from time to time?

A. Yes, occasionally.

Q. And why did you keep track of it?

A. I was interested.

Q. And was there something particular about it that interested you?

A. Well, I have always been interested in politics and

* * *

[*17] Q. Did someone suggest to you--did Mr. Cromartie perhaps suggest to you that they needed some more plaintiffs, that the case needed some more plaintiffs?

A. No, I don't think so. I discussed it with him. I am sure of that. And he knew I had an interest in it, and you know, maybe after that I just decided to join, I guess.

Q. Well, did you say to him, "I would like to join this lawsuit if it is not too late," or did he say---

A. (interposing) I may have.

Q. ---"We could use some more plaintiffs"?

A. Yeah. I may have. I may have; uh-huh. This was in telephone conversations, you know. He would call me and we [*18]would discuss it, and I guess that is when I decided to join; uh-huh.

DEPOSITION OF MARTIN LUTHER CROMARTIE, (SEPTEMBER 22, 1999) (SELECTED PORTIONS)

[* 11] Q. Okay; thank you. To shift gears a little bit, when did you first become aware that there was litigation about North Carolina's congressional districting plans in the 1990s?

A. Whenever it hit *The News & Observer*; I don't--I can't recall the exact time, but I have been interested enough in politics and in civil rights to know that I knew about it whenever it hit the public press.

Q. And to the best of your memory, did you learn about it through *The News & Observer* or other media entities such as newspaper or television?

A. I certainly think it would have first been *The News & Observer*.

* * *

[* 12] A. Robinson and his cousin and I knew each other first at Duke. His first year at Duke as a professor was my first year as a law student. And his cousin was a second or a third year student. And we have seen each other off and on since then. And since I spend a lot of time in Washington now and he does, too, we see a lot of each other at a place called Chevy's along with another group of people. And if

* * *

[*13] Q. All right. But you do know Mr. Robinson Everett, the plaintiffs' attorney in this case---

A. (interposing) Yes.

Q. ---personally?

A. Yes.

Q. And you have known him since you went for a while to Duke law school?

A. Since 1950.

* * *

[*16] Q. When did you see him--if you recall, when did you see Robinson Everett personally to talk about this case, to talk about the *Shaw* case?

A. I can't--I just don't know when it was.

Q. Well, can you ball park it whether it was closer to the time that you first learned about the suit or whether it was closer to 1996 when you became involved as a plaintiff?

A. Oh, we had talked about it before I was a plaintiff.

Q. All right. And had you talked about it a number of times by then?

A. Yes.

Q. All right. And do you know any of the original plaintiffs in the *Shaw* suit?

A. Melvin Shimm; I don't remember the names of any others, so I don't think I knew them.

Q. And is Melvin Shimm a professor at Duke University law school?

A. He just retired.

* * *

[*26] Q. All right. And did Robinson suggest to you that you become a party or did you suggest it to him---

A. (interposing) No.

Q. ---or did it come about some other way?

A. He suggested it.

* * *

[*30] Q. Did you understand that the Supreme Court had said that there weren't any plaintiffs in the *Shaw* suit who lived in the 1st District?

A. Well, I understood that at the time I joined in, because Robinson and I talked about that and I am sure that is the reason--that is the reason Robinson asked me to join in.

[*31] Q. So your understanding was that you lived in the 1st District at least in 1996?

A. Oh, wait a minute; I said 1st. It was the 2nd District then. Let me put it this way: I joined in because I was in--lived in Edgecombe County, and that was a county which fitted Robinson's needs in the lawsuit.

* * *

[*36] Q. And by the way, to your knowledge, this lawsuit wasn't a--it wasn't a class action, was it?

A. No. If I know what a class action is, it was not a class action. It seems in a way to have elements of a class action because in a way it was brought on behalf of all the residents of the congressional district.

And I think it can really even be construed--I don't know why we had to be members of the district. If I were the judge I would say a change in any district affects the whole [*37] state, a substantial change in any district. And any voter in the state could challenge.

* * *

[*43] Q. And in this new case you didn't file that as a class action, either, did you? The *Cromartie* case is not filed as a class action, is it?

A. I have never done a class action lawsuit and I am not really sure what constitutes one. My thought was that we were representing at least the rest of residents of my congressional district and maybe the residents of all of North Carolina, and one could even think beyond that.

[*44] Q. And you are essentially representing the same group of people effectively that you were--in the *Cromartie* case that you were in the *Shaw* case?

A. Oh, I think so. I was representing my ideology and those who held the same ideology.

* * *

[*57] A. I am not related to any of them. Chan Muse is a friend.

Q. And does he also live in---

A. (interposing) Tarboro.

Q. ---Tarboro? Okay.

A. Chan is a retired attorney.

Q. Did you suggest to him that he become involved in this lawsuit?

[*58] A. Yes. And incidentally, he has also always voted for Eva Clayton, in poor health now and he is interested in the same thing he says she is interested in, which is social security and Medicare.

Q. And are you close friends or acquaintances with any of the other plaintiffs in the *Cromartie* suit?

A. I don't see her name here, but we joined--when Robert Curtis Wheeler, the retired Clerk of Court, died--I had asked that he be joined, or asked him to join. And he died and I asked his wife to carry on his fight. And I don't know--she is not here, but she is in the suit.

Q. And then you suggested that she also join the lawsuit?

A. Yes.

Q. And before that did you suggest to her husband that he join the lawsuit?

A. Yes.

* * *

[*75] Q. And then--so in terms of the things you knew about the lawsuit, the Supreme Court also said about the 1st District that it would not adjudicate that because there was no plaintiff in the lawsuit from the 1st District?

A. Yes.

Q. And as you were following this along with Robinson in a conversation where that issue came up, he asked you and you agreed to be a plaintiff?

A. Correct.

Q. And you went out and talked to your friend Chan Muse---

A. (interposing) That is right.

Q. ---who is an attorney there in Tarboro---

A. (interposing) Yes.

Q. ---and some others so that there would be plaintiffs from the 1st District---

A. (interposing) Yes.

* * *

[*77] Q. So within six days of each other you filed a motion to intervene as a plaintiff, as a 1st District plaintiff in the *Shaw* case and you also filed a separate lawsuit?

A. Correct.

DEPOSITION OF REUBEN O. EVERETT, (OCTOBER 1, 1999) (SELECTED PORTIONS)

[*26] Q. And let's see here. Now, for the record, are you kin to Mr. Robinson Everett, the plaintiff's counsel here?

A. Yes, ma'am, I am. I am his first cousin. His father and my father were brothers. And my father named me for his father before his father got married and he came along. And that is why he is not a junior.

Q. You didn't want two with exactly the same name in your generation?

[*27] A. Listen, I have had enough problems coming along myself.

Q. So you are both R. O. Everett, but you have different names?

A. He is Robinson O. and I am Reuben O.; yes, ma'am.

Q. And have you and your cousin Robinson Everett kept in pretty good communications over the years?

A. Yes, ma'am, at family gatherings. We haven't--we haven't, unfortunately, spent a lot of time together, but we have stayed in touch; yes, ma'am.

* * *

[*29] Q. Did you learn about it from your cousin or from another relative or a mutual friend, or did you---

A. (interposing) As I remember, I read it in the newspaper because--that is it. I don't remember any conversation.

Q. So as far as you know you first learned about it from the newspaper?

A. Yes, ma'am, back in whenever it began, *Shaw v. Reno*; yes, ma'am.

Q. Around 1992; does that sound right?

A. Something like that, correct.

Q. And did you communicate with him then to say "I read about your lawsuit"?

A. Specifically as an example of that, not that I remember. I didn't call him up. I didn't go down to see him or anything along that line, but as our paths would cross I am sure I mentioned it to him and was interested in what he was doing, always have been.

Q. And at that time he wasn't your attorney in this lawsuit---

[*30] A. (interposing) That is correct.

Q. ---so it wasn't an attorney-client communication; right?

A. That is correct.

Q. And when you saw him from time to time like at a family gathering or whatever did he tell you how the lawsuit was going?

A. Only as I remember in very general and very unspecific terms. I don't remember anything specific about it at all.

Q. And did you ever talk to him at those times about possibly becoming a plaintiff in the lawsuit?

A. No, don't remember that.

Q. And then in November of '95 you wrote to him what is Exhibit 63 and referred to a newspaper article. And what was that newspaper article about?

A. I do not remember.

Q. Okay. You don't remember that. The newspaper article is gone; just the note is left?

A. That is it.

Q. Now, as of November '95 you hadn't yet thought about becoming a plaintiff. Do you recall when you considered becoming a plaintiff?

A. It was after the *Shaw v. Reno* Supreme Court decision. And Judge Everett somewhere in our discussions he said that he needed to start over. I don't remember any specific

[*31] conversation along that line, except that I remember that it was a very general approach.

Sometime later we were talking. He called me and said he needed a plaintiff in Rowan County. And I said, "Well, I'm here," or something along that line. And he said, "Well, if you're interested in joining, I'll be glad to have you as a plaintiff," something along that line. I don't remember the specifics, but that is paraphrasing.

Q. You didn't volunteer. You accepted--you were drafted---

A. (interposing) No, no.

Q. ---literally?

A. No, no; no, no.

Q. No?

A. No, no; no, no. I didn't call him up and volunteer, Ms. Harrell.

Q. Okay.

A. But I did willingly and happily join participation.

Q. Okay.

A. It was not draft. It was not any arm twisting or coercion or anything along that line.

Q. You went willingly, but you---

A. (interposing) Happy to.

Q. ---didn't--it was not your initiative that led to it; is that right?

DEPOSITION OF JACOB HENRY FROELICH, JR. (SEPTEMBER 30, 1999) (SELECTED PORTIONS)

[*13] A. I know Greg Everett.

Q. And Robinson Everett?

A. I know Robinson Everett.

Q. And Dorothy Bullock?

A. Dorothy Bullock, yes.

Q. You know her?

A. Uh-huh.

Q. How do you know Ms. Bullock and the Everetts?

A. I have been involved in the television business and have been in business--we have been in business together in the television business in Greensboro and also in Wilmington.

Q. You have been in business with Robinson Everett, would that be?

A. Yes; and his mother, who is deceased. And Dorothy Bullock is the lady in the office that I would--who would communicate with me.

Q. And is Greg Everett Robinson Everett's son?

(Witness nods affirmatively.)

Q. Have you had any business dealings with him or just know him as Robinson Everett's son?

A. I just know him as Robinson's son.

Q. When did you first become involved in business with Robinson Everett and Ms. Catherine Everett?

A. In the 70s.

Q. In the 1970s; okay.

[*14] A. Or really late '60s.

Q. Once you went to vote in 1992 and found out that you were in the 12th District, did you contact Robinson Everett about this lawsuit?

A. I think I was conscious of what was going on, and I may have mentioned to him that I was pleased that that was going on when I saw him under some--I didn't go vote and call Robinson, no.

Q. Did you try to keep track of the *Shaw* lawsuit?

A. I very much did.

Q. And how did you keep track of it?

A. In the press and finding out what is going on; I have been involved in politics in North Carolina all my adult life. I have been chairman of the Democratic Party in Guilford County. I ran Skipper Bowles' campaign for governor in 1972.

I have been involved very much in what goes on politically in North Carolina and how North Carolina is put together. So I very much agreed that a suit ought to be filed because I thought the congressional district was absolutely not justifiable at all.

Q. Did you talk about it with Robinson Everett other times other than just mentioning to him that you agreed with the suit?

A. Well, I am sure I had conversation with him, yes,

* * *

[*22] Q. You were never a plaintiff in the *Shaw* case; right?

A. I wasn't a plaintiff in the *Shaw* case.

Q. Were you aware that the *Shaw* plaintiffs asked the court not to rule on the 1997 plan in that case?

A. Say again.

Q. Were you aware that the *Shaw* plaintiffs asked the court

not to rule on the validity of 1997 plan in that case?

A. Yes.

Q. You were?

A. I think I was.

* * *

[*30] A. I mean, I was told what was going to happen and I agreed to that.

Q. You were told this is the way it would work; is that right?

A. The way it was going to--the way it was in the process of working, yes.

Q. How did it come about that you were going to become a plaintiff in this lawsuit?

A. Because I felt very strongly that something had to be done.

Q. All right. And had you previously told Robinson Everett that you would like to be a plaintiff or were willing to be a plaintiff?

A. Yes.

Q. Had you done that before you filed your declaration in the *Shaw* suit? Do you recall?

A. I don't remember that.

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DEPOSITION OF JAMES RONALD LINVILLE, (SEPTEMBER 30, 1999) (SELECTED PORTIONS)

[*14] Q. Now, after you read about this first suit in the paper, did you try to keep track of it?

A. To some degree I tried to follow it because it did impact me. I was in the 12th. My dad, who lives closer to Winston-Salem than I do, was in the 5th. We couldn't understand that at all. You know, as a veteran I kind of feel like that--you know, my family, we gave a lot to this country.

Q. Okay.

A. I want to finish this.

Q. Oh, I'm sorry.

A. My dad and my uncle, uncles, they fought; I fought. And all we have got is this vote, and it is real important that we all have the right to vote and be part of our community.

And this district took me out of the people that I associate with, people I live with, people I have interaction [*15] with, and compelled me to deal with people outside of where I live through my voting. And I see that--it is wrong, and so that is why I am here.

* * *

[*19] A. I read it in the paper.

Q. And at that time you still didn't know Mr. Robinson Everett, or did you?

A. I don't know when I first talked to Mr. or Dr.--is it Dr.?

Mr. McGee: Judge, Professor.

A. Judge, Mr.; basically realized where I was in the 12th, didn't like the shape of it. I am a rural person. I was being connected to urban centers. And I basically just called Dr. Everett up and told him I appreciated what he was doing because it was a really weird configuration. And that is how I kind of got involved in it.

Q. So you called up---

A. (interposing) I just called him and said, you know, "I appreciate what you are doing for people that live out in the countryside," and one thing led to another. I didn't intend to get involved. I was just trying to say thanks for trying to do something for the people out here in the rural areas.

* * *

[*24] Q. Was it your understanding that Mr. Everett and his co-counsel needed some plaintiffs for the 12th District?

A. I think that there has to be people that have standing; yes.

Q. And it was your--it was your understanding that they needed plaintiffs who lived in the 12th District and would have standing to challenge it; is that right?

A. Yes.

Q. Did you know of any reason why you couldn't have been **[*25]** added in the original lawsuit through an amendment to challenge the 12th--new 12th District there?

A. I don't remember the timing nor how all this came about. I probably could have been, but I just didn't--I just wasn't.

* * *

[*27] Q. And if I am understanding you correctly, you are opposed to dividing any counties to make districts; is that right?

A. I would be, yes, ma'am. They have county seats. They have got local governments. And that is what the people have to deal with on a local level.

* * *

[*36] A. In the '97 plan--if this is the '97 plan, I am in--I am in the '97 plan in the 5th. My father, who was in the 5th, is now in the 12th, who lives closer to Winston, to the core of Winston.

Q. So under the 1997 plan, you would not be a resident of the 12th District; is that right?

A. Right. Now, I had a problem with that because when

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DEPOSITION OF THOMAS CHANDLER MUSE, (OCTOBER 4, 1999)(SELECTED PORTIONS)

[*24] Q. When did you first become aware of the lawsuit concerning the congressional redistricting?

A. I think Martin Cromartie called me. I am not sure. It might have been Mr. Everett that called me first, but one of them called me. And I came up--Martin came up with me sort of under my wing and I sort of hate to say that, but--because it is something else to fly out from under your wing. But Martin called me, and I knew the ball game was finished then. If you were watching the ball game and Martin called, you might as well cut your set off because you are going to talk for two hours. So he may have told me about it and--or Mr. Everett may have. I don't know which.

Q. And did you know Robinson Everett beforehand?

A. I knew of him very well through Martin, who told me that he was his favorite professor in law school and that Mr. Everett would be in touch with me because he was going to try

* * *

[*44] Q. All right. And so you and Mr. Cromartie and Mrs. Weeks jointed the lawsuit and cured any problems of any standing to challenge the 1st District; is that right?

A. That is right. And if he drops dead tonight, I will try to take the lead.

* * *

[*45] Q. And it is your understanding that the lawsuit was a class action?

A. Yes, ma'am.

[*46] Q. And it was brought on behalf of all the citizens of the 1st and 12th Districts---

A. (interposing) Absolutely.

Q. ---or all over the state?

A. Absolutely.

DEPOSITION OF ALMA LOIS WEAVER, (OCTOBER 4, 1999) (SELECTED PORTIONS)

[*7] Q. And when did you first become aware of this lawsuit?

A. Like I said, Mr. Cromartie told me about it. And he didn't go into any details. And I became aware of it really when my husband was interested in this and talked some about **[*8]** it, but not enough that I could really, you know, get that much. But my husband passed away, and so I thought that I would do this in his memory.

* * *

[*11] would be a good thing to do to honor him.

Q. All right.

A. I hope so.

Q. If you don't mind telling me, when did you husband pass away?

A. The 22nd of April.

Q. 22nd of April. And in between then and August 31 at some time you talked to Mr. Everett about substituting, or did you talk to Mr. Cromartie about it?

A. Cromartie; Martin calls me right regular. Curtis and I have known him for years, ever since my husband was at the courthouse in Tarboro. And he calls me quite often, especially since Curtis passed away, you know, just condo-lences and everything.

Q. He wants to see how you are getting along?

A. Yes, ma'am. That is basically it.

Q. And Curtis was your husband?

A. Yes.

Q. And what did he do?

A. He was Clerk of Superior Court in Edgecombe County.

* * *

[*12] Q. Now, did you know Mr. Everett before you became part of this lawsuit?

A. No, ma'am.

Q. Now, you know Mr. Cromartie?

A. Yes, I do.

Q. And do you know Mr. Bourne and Mr. Muse?

A. He has been a neighbor and a friend of ours for years. We lived on the next block from where Mr. Bourne lives for 32 years.

Q. And did you know Mr. Muse?

A. I had met him before, but I hadn't, you know, known him that closely as I had Mr. Bourne.